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## The problem of unwanted online publication and use of images of children and young people : A legal challenge

Anna Bunn

*The University of Notre Dame Australia*

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The University of Notre Dame Australia

School of Law

**The Problem of Unwanted Online Publication  
and Use of Images of Children and Young People:  
A Legal Challenge**

Anna Bunn, BA, MA (Oxon)

This thesis is presented for the degree of Doctor of Philosophy  
(Law)

2017

## **Declaration**

To the best of my knowledge and belief this thesis contains no material previously published by any other person except where due acknowledgement has been made.

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution.

Signature:

Date: 7 December 2016

## Acknowledgements and Dedication

No-one said it would be easy to get to this stage, and it certainly was not. Thankfully, however, although the road has been long and sometimes rocky, it has been a road worth travelling. Happily, also, it is not a road I have had to travel alone. I am forever grateful to my wonderful supervisor, Professor Joan Squelch. It is thanks to her that I was ever able to begin this journey in the first place. Without her, I probably would never have come to Australia, commenced a career in academia, nor had the opportunity of pursuing doctoral studies. I am grateful to Joan for believing in me, and giving me the encouragement, confidence, support, input and advice that has kept me going and meant so much. I am so grateful also that she agreed to supervise me at a time when she had (as she still has) so much else on her plate. I am also grateful to my co-supervisor, Associate Professor Joseph Fernandez. I have very much appreciated his approach to supervision, his thoughtful input into both the big picture and the small details, and the fact that he has been unfailingly positive, even in his critique. My first supervisor, the late Professor Pauline Sadler, was such an inspiration. Her guidance and friendship is much missed.

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I dedicate this thesis to my late sister, Kirsty Bunn, and to my late first supervisor, Professor Pauline Sadler.



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## DEFINED TERMS AND ABBREVIATIONS

### *List of Defined Terms*

Term Used	Definition
Internet Content Host	A person who hosts internet content in Australia – as per the definition in the <i>Broadcasting Standards Act 1992 (Cth)</i> sch 5, cl 91(1)(b). The term ‘host’ is not itself defined in the legislation. To borrow from Leonard, the term will refer generally to an internet intermediary (rather than an individual) that stores, caches or otherwise provides access to third-party content. As Leonard notes, ‘[w]hile any person could set up a blog or Web site on a home server, few people bother to do so.’ <sup>1</sup> Google, Yahoo!, YouTube, Flickr and Blogger are all examples of internet content hosts. The term internet content host includes all social media providers.
Internet Intermediary	The term ‘internet intermediary’ is used here in the same sense as it is used by the ALRC in its 2014 report, ALRC, <i>Serious Invasions of Privacy in the Digital Era</i> , Report no 123 (2014) 207 [11.100] and note 125: the ALRC notes that the term ‘internet intermediary’ is a broad one, ‘commonly used to cover carriage service providers, such as Telstra or Optus; content hosts, such as Google or Yahoo!; and search service and application service providers, such as Facebook, Flickr and YouTube’ referring to Leonard. <sup>2</sup>
Internet Service Provider	The term Internet Service Provider (‘ISP’) is defined as per the <i>Broadcasting Services Act 1992 (Cth)</i> Sch 5 cl 8. An ISP is essentially an organisation enables others to access the internet. Examples of ISPs are iiNet and BigPond.
Online Content Provider	A person who makes content available on the internet whether or not they authored or created the content themselves and whether or not the content is hosted by themselves or another person. For example, a person who uploads a photograph to their personal Facebook page would be an online content provider. A person who comments on a photograph or writes a post on another person’s Facebook page would also be an online content provider. All internet content hosts are also online content providers in relation to the content that they host.

<sup>1</sup> Peter Leonard, ‘Safe Harbors in Choppy Waters – Building a Sensible Approach to Liability of Internet Intermediaries in Australia’ (2010) 3 *Journal of International Media and Entertainment Law* 221, 226

<sup>2</sup> Ibid.

Social Media Provider	A social media provider is an internet content host that is also a social media service. Social media providers include Facebook, MySpace, Twitter and YouTube.
Social Media Service	A social media service has the meaning given by <i>Enhancing Online Safety for Children Act 2015</i> (Cth) s 9.

### *List of Abbreviated Terms*

ABC	Australian Broadcasting Authority
ACL	<i>Australian Consumer Law</i> (which is Schedule 2 of the <i>Competition and Consumer Act 2010</i> (Cth))
ACMA	Australian Communications and Media Authority
ACT	Australian Capital Territory
ADFA	Australian Defence Force Academy
ALRC	Australian Law Reform Commission
APPs	Australian Privacy Principles
AANA	Australian Association of National Advertisers
BSA	<i>Broadcasting Services Act 1992</i> (Cth)
CCTV	Closed-circuit Television
CEO	Chief Executive Officer
CRC	<i>Convention on the Rights of the Child</i> , opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)
Cth	Commonwealth
DRM	Digital Rights Management
ECHR	<i>European Convention on Human Rights</i> also known as <i>Convention for the Protection of Human Rights and Fundamental Freedoms</i> opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by <i>Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms</i> , opened for signature 27 May 2009, CETS No 194 (entered into force 1 June 2010)
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	<i>International Covenant on Civil and Political Rights</i> , opened for signature 16 December 1966, 999 UNTS 171 and 1057 UNTS 407 (entered into force 23 March 1976)
IIA	Internet Industry Association
ISP	Internet Service Provider
JSCCS	Joint Select Committee on Cyber-Safety
MMS	Multimedia Messaging Service
NGO	Non-Governmental Organisation
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
NT	Northern Territory
OAIC	Office of the Australian Information Commissioner
Qld	Queensland
RIS	Research Impact Statement
SA	South Australia

SDA	<i>Surveillance Devices Act 1998</i> (WA)
SMS	Short Message Service
Tas	Tasmania
UDHR	<i>Universal Declaration of Human Rights</i> , GA Res 217A(III), UN GAOR, 3 <sup>rd</sup> sess, 183 <sup>rd</sup> plen mtg, UN Doc A/810 (8 December 1948)
UNHCHR	United Nations High Commissioner for Human Rights
UNHRC	United Nations Human Rights Committee
US	United States
Vic	Victoria
VLRC	Victorian Law Reform Commission
WA	Western Australia
SNS	Social Network Site
SCAG	Standing Committee of Attorneys General
UK	United Kingdom

### Case Names Abbreviated

<i>Andrews</i>	<i>Andrews v Television New Zealand Limited</i> (Unreported, High Court of New Zealand, Allan J, 15 December 2006)
<i>Aubry</i>	<i>Aubry v Éditions Vice-Versa</i> [1998] 1 SCR 591
<i>Campbell</i>	<i>Campbell v MGN Ltd</i> [2004] 2 All ER 995
<i>Chang</i>	<i>Chang v Virgin Mobile USA LLC</i> (19 October 2007), Dallas 3:2007cv01767 (Tex. Dist. Ct.)
<i>Coco v Clark</i>	<i>Coco v AN Clark (Engineers) Ltd</i> [1969] RPC 41
<i>Coeriel</i>	<i>Coeriel and Aurik v the Netherlands</i> (9 December 1994) Human Rights Committee, 52 <sup>nd</sup> sess, Communication No 453/1991 CCPR/C/52D/453/1991
<i>Doe v ABC</i>	<i>Doe v Australian Broadcasting Corporation</i> [2007] VCC 281 (3 April 2007)
<i>Douglas</i>	<i>Douglas v Hello!</i> [2001] QB 967
<i>Elton John</i>	<i>Sir Elton John and Ors v Countess Joulebine and Ors</i> [2001] MCLR 91
<i>Ettingshausen</i>	<i>Ettingshausen v Australian Consolidated Press Ltd</i> (1991) 23 NSWLR 443
<i>Fitzgerald</i>	<i>Fitzgerald &amp; Anor v 33 South Pty Ltd &amp; Anor</i> [2008] FMCA 1132 (13 August 2008)
<i>Grosse</i>	<i>Grosse v Purvis</i> (2003) Aus Torts Reports ¶181-706
<i>Faloona</i>	<i>Faloona v Hustler Magazine, Inc</i> 799 F.2d 1000 (5 <sup>th</sup> Cir. 1986)
<i>Giller</i>	<i>Giller v Procopets</i> (2008) 24 VR 1
<i>Google</i>	<i>Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González</i> (Case C-131/12, 13 May 2014) [2014] QB 1022 (European Court of Justice) 1074
<i>Grillo</i>	<i>Maria Pia Grillo c. Google Inc</i> 2014 QCCQ 9394 (Cour Du Québec)
<i>Gutnick</i>	<i>Dow Jones &amp; Co Inc v Gutnick</i> (2002) 210 CLR 575
<i>Henderson</i>	<i>Henderson v Radio Corp</i> (1960) SR NSW 576
<i>Hornsby</i>	<i>Hornsby Building Information Centre v Sydney Building Information Centre</i> (1978) 140 CLR 216
<i>Hosking</i>	<i>Hosking v Runting</i> [2005] 1 NZLR 1
<i>Lenah</i>	<i>ABC v Lenah Game Meats Pty Limited</i> (2001) 208 CLR 199
<i>Murray</i>	<i>Murray v Big Pictures (UK) Limited</i> [2008] EWCA Civ 446
<i>Naidu</i>	<i>Nationwide News v Naidu</i> (2007) 71 NSWLR 471
<i>Peck</i>	<i>Peck v The United Kingdom</i> [2003] I Eur Court HR 123



<i>Pollard</i>	<i>Pollard v Photographic Co</i> (1889) 40 Ch D 345
<i>Radio 2UE</i>	<i>Radio 2UE v Chesterton</i> (2009) 238 CLR 460
<i>Rana</i>	<i>Rana v Google Australia Pty Ltd</i> [2013] FCA 60 (7 February 2013)
<i>Reklos</i>	<i>Reklos and Davourlis v Greece</i> (European Court of Human Rights, Chamber, App No 1234/05, 15 January 2009)
<i>Saad</i>	<i>Saad v Chubb Security Australia Pty Ltd ('Saad')</i> [2012] NSWSC 1183 (4 October 2012)
<i>Taco Bell</i>	<i>Re Taco Company of Australia Inc; Taco Bell v Taco Bell Pty Ltd</i> (1982) 42 ALR 177
<i>Talmax</i>	<i>Talmax Pty Ltd v Telstra Corporation Ltd</i> [1996] QSC 34 (14 March 1996)
<i>Teoh</i>	<i>Minister for Immigration and Ethnic Affairs v Teoh</i> (1995) 183 CLR 273
<i>Weller</i>	<i>Weller and Ors v Associated Newspapers</i> [2015] EWCA Civ 1176
<i>Wilkinson</i>	<i>Wilkinson v Downton</i> [1897] 2 QB 57, 58–59
<i>Wilson</i>	<i>Wilson v Ferguson</i> [2015] WASC 15 (16 January 2015)
<i>Windridge Farm</i>	<i>Windridge Farm Pty Ltd v Grassi</i> [2011] NSWSC 196

### Legislation Titles Abbreviated

<i>Criminal Code</i>	<i>Criminal Code Compilation Act 1913</i> (WA)
<i>Online Safety Act</i>	<i>The Enhancing Online Safety for Children Act 2015</i> (Cth)
<i>Privacy Act</i>	<i>Privacy Act 1988</i> (Cth)
<i>SDA</i>	<i>Surveillance Devices Act 1998</i> (WA)

## ABSTRACT

The online publication of images of children and their subsequent use has the potential to cause harm to a child who is a subject of such an image. Indeed, the publication and distribution of photographs or video clips has been found to be one of the most impactful forms of bullying.<sup>1</sup> Even outside a cyberbullying context, however, this thesis argues that two important aspects of a child's social and emotional development — namely their self-esteem and the development of relationships — can be harmed by the unwanted online publication or subsequent use of an image of that child. In particular, this thesis argues that an image subject can be harmed by the online publication of an image or its use even where the publication or use is not ill-intentioned and regardless of whether or not the image can be described, objectively, as harmful. In view of this, the thesis examines the extent to which the current Australian legal framework, as well as existing social norms, the architecture of the internet and the market, are sufficient to address the problem of the unwanted online posting of an image of a child or its subsequent use. After concluding that the current status quo does not sufficiently address the problem, and having argued that Australia's commitments to children's rights under the *Convention on the Rights of the Child* obliges it to do more, the thesis argues that Australian law should be reformed to give children greater control over their image in the online environment than they currently enjoy. Possible legal responses that would give children greater control over their image are then considered and evaluated, and one particular response is recommended. The need for further research and for a multi-faceted approach to the problem highlighted in this thesis is identified.

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<sup>1</sup> Peter K Smith et al 'An Investigation into Cyberbullying, its Forms, Awareness and Impact, and the Relationship between Age and Gender in Cyberbullying' (Research Brief No RBX03-06, University of London, July 2006).



# CHAPTER ONE – INTRODUCTION, OBJECTIVES AND SCOPE

## I CHAPTER INTRODUCTION

The central issue with which this thesis is concerned is encapsulated in the following submission made by the New South Wales ('NSW') Commission for Children and Young People, describing the input it had received from youth on the issue of unauthorised photography:

Young people suggested to the Commission that a person being photographed should consent to how the photograph should be used. They said that people should have some control over how they are represented on the internet, in the media, or through other forms of mass communication, such as mobile phones.<sup>1</sup>

This purpose of this thesis is to examine the issue of the publication and use of images (photographs and videos) when, from the perspective of an image subject who is a child or a young person, that publication or use is unwanted. Specifically, it will argue that young people should indeed have some control over how they are represented on the internet, and certainly more control than they currently do have.<sup>2</sup> This thesis will also argue that the unwanted online publication of images or unwanted use of online images of children poses a risk to their development and that, in order to fulfil its commitments to children's rights under the *Convention on the Rights of the Child* ('CRC'),<sup>3</sup> Australia should do more, by way of a regulatory response, to address this risk.

## II BACKGROUND

The broader issue of the unwanted capture and publication of images of children has been considered recently in the context of the Australian Law Reform Commission's review of Australian privacy law and practice.<sup>4</sup> In its final report, *For Your Information*, released in 2008, the Australian Law Reform Commission ('ALRC') notes that '[t]he taking of photographs and other images of children and young people without consent has raised significant concerns in recent times' and that many of those concerns have arisen as a result of the use of mobile or digital technology.<sup>5</sup> Further the ALRC has expressed the view that existing laws in Australia do not sufficiently protect an individual's privacy interests

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<sup>1</sup> New South Wales ('NSW') Commission for Children and Young People, Submission to SCAG Discussion Paper, *Unauthorised Photographs of the Internet and Ancillary Privacy Issues*, October 2005, 3 [5.2].

<sup>2</sup> The thesis will confine itself, however, to examining the online publication of images and use of online images rather than the broader question of how young people are represented through various other mediums.

<sup>3</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').

<sup>4</sup> Australian Law Reform Commission ('ALRC'), *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008).

<sup>5</sup> *Ibid*, vol 3, 2571 [74.141].

in relation to the publication of images.<sup>6</sup> The unwanted online publication of images was also the subject of an earlier report by the former Standing Committee of Attorneys General ('SCAG')<sup>7</sup> and has recently been considered in the context of concerns over children's safety, arising from the proliferation of 'harmful online content'.<sup>8</sup> In its report into cyber-safety, the Joint Select Committee on Cyber-Safety ('JSCCS') observed that the topic of photo sharing 'is frequently raised in broader public discussion' and 'illustrates complexities and nuances of the online environment'.<sup>9</sup> According to the JSCCS, the decision of young people to share photographs of others online raises important issues about 'how posting photos of others can create additional concerns of permission, ownership and the ability to control one's personal information'.<sup>10</sup>

Various media reports have highlighted some of the most shocking stories of young people suffering due to the publication or threatened online publication of images of themselves. One example, discussed in more detail in Chapter Two, is that of Amanda Todd. Amanda Todd was a Canadian teen who in a video posted before she took her own life described how she was blackmailed into exposing herself online and then suffered from bullying after her pictures were posted on Facebook.<sup>11</sup> Another example is that of the so-called 'ADFA Skype Sex Scandal' of 2011, where a young Australian female cadet training at the Australian Defence Force Academy ('ADFA') was, unbeknown to her, filmed having sex with a male cadet who simultaneously broadcast the images, via Skype, to a number of other army cadets. In a victim impact statement, read out in court, the former female cadet said that she 'became nothing more than "that Skype slut"'.<sup>12</sup>

There are many examples of online image sharing which, although not as extreme as those referred to above, are potentially problematic. One 16 year old respondent to the JSCCS's 'Are you Safe?' survey observed as follows:

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<sup>6</sup> Ibid. See also NSW, Standing Committee on Law and Justice, *Remedies for the Serious Invasion of Privacy in New South Wales*, Report, 3 March 2016, 57 [4.12]; South Australian Law Reform Institute, *A Statutory Tort for Invasion of Privacy*, Report no 4, March 2016, 15.

<sup>7</sup> SCAG, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper (2005). SCAG became the Standing Council on Law and Justice (formerly SCAG). That Council, and the former Standing Council on Police and Emergency Management were replaced by a single council, the Law, Crime and Community Safety Council, in 2013: Attorney-General's Department, Australian Government, *Law, Crime and Community Safety Council* < <https://www.ag.gov.au/About/CommitteesandCouncils/Law-Crime-and-Community-Safety-Council/Pages/default.aspx> >.

<sup>8</sup> Department of Communications (Cth), *The Coalition's Policy to Enhance Online Safety for Children*, September 2013; Department of Communications (Cth), *Enhancing Online Safety for Children – Public Consultation on Key Election Commitments*, January 2014.

<sup>9</sup> JSCCS, Parliament of Australia, *High Wire Act: Cyber-Safety and the Young*, Interim report (June 2011).

<sup>10</sup> Ibid 238–9 [7.122].

<sup>11</sup> 'Man Charged in Netherlands in Amanda Todd Suicide Case', *Europe, BBC News* (online), 18 April 2014 <<http://www.bbc.com/news/world-europe-27076991>>.

<sup>12</sup> Ewan Gilbert, 'ADFA Skype Sex Scandal "Destroyed My Life": Victim', *ABC News* (online), 14 October 2013 <<http://www.abc.net.au/news/2013-10-14/adfa-skype-sex-cadet-linked-to-second-scandal/5020704>>.

I havnt been on Facebook for about 3 months but every time when I logged on their would be someone fighting with someone on someones wall or status — stupid photos put up on purpose. for example if a girl was at a party and might of been sitting in a position and a camera just so happened to take an awkward shot of her underwear or something — this event is totally innocent but the person who uploads this photo onto the internet is an idiot — this happens a lot. photos which at the time are accidental or the subject might not even know are being taken are being put up on the internet for everyone to see. And what girl wants photos of their underwear all over the internet. this example happens alllllloooooottt!<sup>13</sup>

In other cases, the online sharing of an image may cause distress even if it reveals nothing awkward, intimate, embarrassing or private. For example, in its 2005 report on Unauthorised Photographs and Ancillary Privacy Issues<sup>14</sup> SCAG observed that ‘the issue of unauthorised photographs on the Internet was highlighted ... when a number of unauthorised photographs of children were posted on voyeuristic websites’.<sup>15</sup> Although the photographs themselves were innocent (mostly depicting schoolchildren involved in sporting activities), the context of their use caused ‘distress to those involved’.<sup>16</sup>

The potential for the unauthorised use of images to cause harm is, in the preceding examples, fairly self-evident. However, it is argued in this thesis that the existence of an image of a child in the online environment, where its existence is unwanted by the image subject, can nevertheless be problematic, even if both the image itself and the context of its use can be described as ‘benign’. It will be argued that the unwanted online existence of an image of a child or young person poses a risk of harm at a developmental level to the child who is the subject of that image. This is not least because the lack of control as to how an image is used can result in low self-esteem on the part of the image subject and has the potential to impact detrimentally on an individual’s relationships and their sense of ‘relatedness’ with (or sense of being connected to) others.

Where an image is such that a reasonable person would find its online publication unacceptable and offensive, legal mechanisms might be available to the image subject to secure the withdrawal of the image from publication. Nevertheless, there are acknowledged gaps in Australian law. As noted by SCAG in reference to a number of specific situations involving the unauthorised capture or publication of photographs, ‘there were few, if any, avenues of redress available to victims of unauthorised photographs posted on the internet.’<sup>17</sup> Where legal avenues are available, practical considerations such as the cost and complexity of pursuing legal action can militate against the practical utility of such actions, particularly where the would-be plaintiff is a

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<sup>13</sup> JSCCS, above n 9, 239 (quoted as written in original).

<sup>14</sup> SCAG above n 7.

<sup>15</sup> Ibid 5 [7].

<sup>16</sup> Ibid 6 [13].

<sup>17</sup> Ibid 6 [17]. See also NSW, Standing Committee on Law and Justice, above n 6; South Australian Law Reform Institute, above n 6, 15.

child. Non-legal avenues of redress may also be open to an image subject in respect of the unauthorised online publication of an image. Where an image is published on a social media site, for example, many site operators have in place complaint mechanisms and will remove images that do not comply with their terms and conditions.<sup>18</sup> However, the efficacy of these mechanisms is sometimes questioned.<sup>19</sup>

If the availability of or access to formal and informal avenues of redress in relation to offensive or objectively harmful images is limited, avenues of redress in relation to images that would likely be regarded as ‘benign’ is almost entirely lacking. In relation to such images there is an almost total absence of legal or formal avenues of redress; and informal mechanisms, it would seem, prove largely unsatisfactory in effecting the removal of such images.<sup>20</sup>

Drawing on research into child development, self-presentation and the developmental implications of computer mediated communication, this thesis argues that an important factor giving rise to the risk or materialisation of developmental harm in relation to the unwanted online publication of images is the insufficiency of control on the part of image subject over the capture, publication, dissemination and use of their image. That the Australian Government should do more, in terms of direct regulation, to give children greater control over the publication and use of images of themselves online is the central proposition of this thesis. This proposition is advanced as a partial response to the

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<sup>18</sup> In the case of Facebook, for example, the company reserves the right to remove content that offends its terms at its discretion, although it places itself under no obligation to do so. The Facebook Terms of Use provide as follows: ‘We can remove any content or information you post on Facebook if we believe that it violates this Statement or our policies’: Facebook, ‘Terms of Service’ (30 January 2015) <<https://www.facebook.com/legal/terms>> term 5(2). Content will offend Facebook’s terms if, among other things, it is pornographic, or explicitly sexual and involves a minor, or if it involves abusive behaviour targeted against an individual: Facebook, ‘Community Standards’ <<https://www.facebook.com/communitystandards>>.

<sup>19</sup> See, eg, Matthew Keeley et al, *Research on Youth Exposure to, and Management of, Cyberbullying Incidents in Australia: Part B – Cyberbullying Incidents Involving Australian Minors, the Nature of the Incidents and How They Are Currently Being Dealt With* (SPRC Report 10/2014) Sydney: Social Policy Research Centre, UNSW, Australia, 86. See also JSCCS, above n 9, 242; the speech made by Senator Bilyk during the second reading debate on the Enhancing Online Safety for Children Bill 2015, where the senator quoted from an email sent by the CEO of Twitter to her Executive Team, in which he wrote: ‘We suck at dealing with abuse and trolls on the platform and we’ve sucked at it for years. It’s no secret and the rest of the world talks about it every day. We lose core user after core user by not addressing simple trolling issues that they face every day. I’m frankly ashamed of how poorly we’ve dealt with this issue during my tenure as CEO. It’s absurd. There’s no excuse for it. I take full responsibility for not being more aggressive on this front’: Commonwealth, *Parliamentary Debates*, Senate, 3 March 2015, 1037 (Catryna Bilyk). See also South Australian Law Reform Institute, above n 6, 49 noting that: ‘The Law Society of South Australia was particularly concerned with the ineffectiveness of industry self-regulation in relation to handling digital content complaints’.

<sup>20</sup> For example, during a High School Forum conducted as part of research for the JSCCS report into cyber-safety, ‘an extremely low percentage’ of students indicated that approaching friends to request them to remove unwanted images was a successful strategy: JSCCS, above n 9, 241, [7.129].

problem that the insufficiency of control by children over the online publication of images of themselves gives rise to the risk of developmental harm.

In arguing for this proposition, this thesis will examine some of the risks to children and young people posed by the online publication of images of themselves, and the significance of 'control' over image from a developmental perspective. It will consider these risks in the context of Australia's obligations to children under the *CRC* and will also consider more generally whether Australia's commitment to children's rights requires more to be done to protect the rights of children with regards to the unwanted online publication of images of children or their subsequent use. Finally, the research will evaluate a number of law reform options that could address these risks, to a greater or lesser extent.

The focus of this research is primarily on situations where an individual's image has been initially placed online by another. However, some of the risks of harm outlined in Chapter Two can also arise when an individual has uploaded their own image to the internet, where the image is then republished or used in a way that is not wanted. An example of this might be the use for commercial purposes of an image that a person has uploaded of themselves to a social media site (where commercial use would not have been intended).

In order to provide some background to this research, the following sections consider issues that have been raised in relation to the unwanted use or posting of images in the context of cyberbullying, privacy and control over personal information.

### A *Images and Cyberbullying*

As mentioned above, concerns over the online publication of images of children have been raised in the context of recent Australian law reform inquiries<sup>21</sup> and governmental discussion papers.<sup>22</sup> The ALRC's 2008 report *For Your Information* noted that the consequences of the online posting of images without the consent of the image subject 'can include bullying, ridicule, embarrassment and generally an invasion of privacy.'<sup>23</sup> A recent discussion paper on enhancing children's online safety recognised that the posting of 'embarrassing or harmful' photographs and videos might itself constitute cyberbullying where that is defined as 'any communication, with the intent to coerce, intimidate, harass or cause substantial emotional distress to a person, using electronic means to support severe, repeated and hostile behaviour.'<sup>24</sup> The Interim Report of the JSCCS, published in

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<sup>21</sup> See, eg, ALRC, *For Your Information*, above n 4; NSW Law Reform Commission ('NSWLRC'), *Invasion of Privacy*, Report No 120 (2009); Victorian Law Reform Commission ('VLRC'), *Privacy Law: Options for Reform*, Information Paper (2001); Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 18 (2010).

<sup>22</sup> SCAG above n 7; Department of Communications (Cth), *Enhancing Online Safety for Children – Public Consultation on Key Election Commitments*, January 2014.

<sup>23</sup> ALRC, *For Your Information*, above n 4, vol 3, 2328 [69.114].

<sup>24</sup> Department of Communications (Cth), above n 22, 3 referring to a particular definition of cyberbullying used by the authors of a study into cyberbullying in Australia and published in the *International Journal of*



2011, refers to a number of common forms of cyberbullying behaviour, which include 'sending out humiliating photo or video messages, including visual pornography and sharing videos of physical attacks on individuals (sometimes called "happy slapping").'<sup>25</sup>

The impact of bullying, including cyberbullying, on children has been the subject of a number of studies and might be considered reasonably well documented,<sup>26</sup> albeit that the need for further research has been recognised.<sup>27</sup> Although cyberbullying can take many forms, of which the online posting of images and videos of a person is just one, research has shown that images and video clips are perhaps the most impactful form of cyberbullying.<sup>28</sup>

Even where the online posting or use of videos and images of a person does not in itself constitute cyberbullying, it can lead to bullying, including cyberbullying.<sup>29</sup> As has been observed by the JSCCS, '[c]yber-bullying is made easier once a young adult makes herself/himself vulnerable by, for example, posting or sending inappropriate photos to others ... or by posting personal photos on Facebook.'<sup>30</sup> This observation holds true in situations where the photograph is posted not by the image subject themselves, but by another person. Moreover, it is submitted that a photograph need not reveal anything particularly personal or inappropriate for it to be used as a basis for others to engage in hurtful or bullying behaviour. As was observed by one of the respondents to the JSCCS's 'Are you Safe?' survey, 'my brothers face book is the worst, he has 300+ friends and they all pick on the fat and ugly people just cause of the way they look.'<sup>31</sup>

## B Images, Privacy and Control

Other concerns around the online posting of images of children relate to the extent to which that posting causes harm to the image subject's privacy interests. The ALRC's 2008 report *For Your Information* noted that some stakeholders had 'highlighted the need to safeguard the safety and privacy of children from people with no legitimate purpose for

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Children's Rights: Aashish Srivastava, Roger Gamble & Janice Boey, 'Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions', *International Journal of Children's Rights* (2013) 21, 27.

<sup>25</sup> JSCCS, above n 9, 70 [3.36].

<sup>26</sup> See generally, Justin W Patchin and Sameer Hinduja, 'Cyberbullying and Self-Esteem' (2010) 80(12) *Journal of School Health* 614; Robert Didden et al, 'Cyberbullying Among Students with Intellectual and Developmental Disability in Special Education Settings' (2009) 12(3) *Developmental Neurorehabilitation* 146. For research referred to, see, eg, Robin M Kowalski et al, 'Bullying in the Digital Age: A Critical Review and Meta-Analysis of Cyberbullying Research among Youth' (2014) 140 (4) *Psychological Bulletin* 1073, 1114–15.

<sup>27</sup> Liberal-National Coalition, *The Coalition's Discussion Paper on Enhancing Online Safety for Children*, November 2012, 11 noting that cyberbullying is one of the many areas where further research would be valuable.

<sup>28</sup> Robert Slonje and Peter K Smith, 'Cyberbullying: Another Main Type of Bullying?' (2008) *Scandinavian Journal of Psychology* 147, 149.

<sup>29</sup> JSCCS, above n 9, 136 [4.48]

<sup>30</sup> *Ibid* 70 [3.39].

<sup>31</sup> *Ibid* 80 [3.55] (quoted as written in original).

taking and publishing photos'.<sup>32</sup> The ALRC stated that there are 'valid concerns that there are some types of capture and publication of images which may not be criminal in nature but still affect an individual's privacy interests.'<sup>33</sup>

Young people themselves have expressed their concerns over the online publication of images of themselves by others. Over 40% of the young Australians who participated in research conducted in 2007 reported that photos and videos had been posted to the internet without their consent.<sup>34</sup> A submission by the *Youthlaw* organisation to the ALRC 2008 inquiry into Australian privacy law and practice noted that it had received a number of complaints from young people in relation to the posting of photographs of themselves on the internet without their consent.<sup>35</sup> The ALRC also observed that:

Despite acknowledging the difficulties associated with the permanent removal of website content, most young people considered that an individual should be able to have a photograph removed from a website if he or she did not consent to its posting. This was seen as a suitable remedy to the unauthorised publication of a person's image, and was considered to be more practical than putting laws in place to prevent the initial posting.<sup>36</sup>

A participant in a High School Forum held to inform the JSCCS's report, framed the issue of online photo sharing in terms of control:

It is interesting that, when a school takes a photo of you, it has to have permission and it is the same everywhere. But a friend can put it up and you can ask them to take it down, but they do not have to because it is on their profile. So even if you do not like that photo and you want them to take it down, they can say no.<sup>37</sup>

The fact that young people desire control over information about themselves is also implicit in some of the decisions they make about their own personal information. For example, a study among American teenagers found that most users of social networking sites choose to set their profile to private and that young people are actively managing their personal information and making important judgements about what information to share and what to keep back.<sup>38</sup> Livingstone found that teenagers using social networking sites described 'thoughtful decisions about what, how and to whom they reveal personal information, drawing their own boundaries about what information to post and what to

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<sup>32</sup> ALRC, *For Your Information*, above n 4, vol 3, 2327 [69.113].

<sup>33</sup> Ibid 2331 [69.122].

<sup>34</sup> Ibid 2225, [67.12].

<sup>35</sup> ALRC, *For Your Information*, above n 4, vol 1, 457, [11.14].

<sup>36</sup> Ibid vol 3, 2234 [67.43].

<sup>37</sup> JSCCS, above n 9, 239 [7.124].

<sup>38</sup> Amanda Lenhart and Mary Madden, 'Teens, Privacy and Online Social Networks' (Report, Pew Internet and American Life Project, 18 April 2007). Nevertheless, at least in the Australian context, research has also shown that older teenagers are more likely than those in the 12–15 age group to set their social media accounts to 'private': ALRC, *Serious Invasions of Privacy in the Digital Era*, Report no 123 (2014) 40 [2.54].

keep off the site’.<sup>39</sup> Research commissioned by the Australian Communications and Media Authority (‘ACMA’), reported in 2009 that ‘privacy controls are considered important in providing children and young people with the choice to protect themselves, regardless of whether they actually use them.’<sup>40</sup> This desire on the part of young people for control over what happens to personal data may be indicative of a broader trend. Graux et al have observed that ‘the ability to control what happens to personal data seems to be perceived as a valuable norm by most netizens already.’<sup>41</sup>

Against this, concerns have arisen about the perceived ‘over-sharing’ of personal information by young people.<sup>42</sup> As Raynes-Goldie explains ‘[a] common theme in both journalistic and academic coverage of online privacy to date has centred on the seemingly ignorant privacy attitudes and activities of young SNS [social network site] users.’ In contrast to Livingstone’s conclusions referred to above, research conducted among American teenagers found that a ‘notable number of teens also engage in online practices that may have the potential to compromise their safety online’.<sup>43</sup> Research carried out by ACMA in 2009 found that

[p]urposeful divulgence of personal details such as passwords was commonplace. Sometimes personal information was divulged without an understanding of the potential consequences of disclosure (for example, posting information about going on holiday and not realising that this could give an unintended recipient information about their whereabouts).<sup>44</sup>

The fact that, on the one hand, children appear to value ‘privacy’ but, on the other, post information that might compromise them in the future has been referred to as the ‘privacy paradox’.<sup>45</sup> Whether the discrepancy between attitudes towards ‘privacy’ and behaviour is in fact a paradox depends, in part, on one’s concept of privacy. If privacy is understood in terms of control over personal information, or the extent to which others have access to one’s personal information — as many privacy theorists have argued it should be<sup>46</sup> — then there is arguably no paradox at all. In other words, to the extent that

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<sup>39</sup> Sonia Livingstone, ‘Taking risky opportunities in youthful content creation: teenagers’ use of social networking sites for intimacy, privacy and self-expression’ (2008) 10(3) *New Media & Society* 393, 403.

<sup>40</sup> Australian Communications and Media Authority (‘ACMA’), ‘Click and Connect: Young Australians’ Use of Online Social Media: 01 Qualitative Research Report’ (July 2009) 9.

<sup>41</sup> Hans Graux, Jef Ausloos and Peggy Valcke, ‘The Right to be Forgotten in the Internet Era’ (2012) 11 ICRI Working Paper, 4 <<http://ssrn.com/abstract=2174896>> 6.

<sup>42</sup> See, eg, ALRC, *For Your Information*, above n 4, vol 3 2238 [67.61]; Katherine Sarah Raynes-Goldie, *Privacy in the Age of Facebook: Discourse, Architecture, Consequences* (PhD Thesis, Curtin University, 2012) 72.

<sup>43</sup> Amanda Lenhart et al, ‘Teens, Kindness and Cruelty on Social Network Sites’, (Report, Pew Internet and American Life Project, 9 November, 2011) 7, 8.

<sup>44</sup> JSCCS, above n 9, 8.

<sup>45</sup> Raynes-Goldie refers to this term as having been coined by Barnes: Raynes-Goldie, above n 42, 4.

<sup>46</sup> See, eg, Alan F Westin, *Privacy and Freedom* (Bodley Head, 1967) 7; Irwin Altman, *The Environment and Social Behaviour: Privacy, Personal Space, Territory and Crowding* (Brooks/Cole Publishing Company, 1975) 18; Ernest Van Den Haag, ‘On Privacy’, in J Ronald Pennock and J W Chapman (eds) *Nomos VIII: Privacy* (Atherton Press, 1971) 149, 149 and Anita L Allen, *Uneasy Access: Privacy for Women in a Free Society*

privacy entails having control or *choice* over ‘when, how and to what extent’<sup>47</sup> information about oneself is communicated to others, a choice to reveal even personal or compromising information may be seen as fully congruent with one’s privacy interests remaining intact. The revelation of one’s personal information by others, on the other hand, may be regarded as an invasion of one’s privacy. Others have explained the so-called privacy paradox by arguing that youth are not unconcerned about privacy, but recognise that they may need to ‘trade off’ privacy in order to reap the benefits of disclosure and publicity,<sup>48</sup> or at least that they recognise that there are both benefits and (privacy) risks relating to the use of social media and that they seek to balance these in their disclosures.<sup>49</sup> As Livingstone puts it: ‘The point is that teenagers must and do disclose personal information in order to sustain intimacy, but they wish to be in control of how they manage this disclosure.’<sup>50</sup>

It has been said that, among the younger generation at least, the privacy discourse is being reframed as a discourse around control and self-determination, rather than as a discourse around the more traditional notion of privacy as ‘the right to be let alone’.<sup>51</sup> However, while young people appear to be concerned about controlling what of their *own* information they reveal and to whom, they may be less concerned over what information they reveal about others. Certainly this is borne out by research conducted in 2008 on a random sample of 2423 public MySpace profiles created by adolescents. The research found that while just over 5% of profiles contained photographs of the profile owner in swimsuits or underwear, nearly 16% of profiles showed images of friends or others in swimsuits or underwear.<sup>52</sup> Although research conducted by the JSCCS found that most young people expressed the belief that it was inappropriate to post photographs of others without permission, comments received from survey participants revealed that the

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(Roman & Littlefield, 1988) 7 both as cited in Daniel J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087, 1103 (FN 71 and 72 respectively).

<sup>47</sup> Referring to Westin’s definition of privacy as ‘the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others’: Westin, above n 46, 7.

<sup>48</sup> Zeynep Tufekci, ‘Can You See Me Now? Audience and Disclosure Regulation in Online Social Network Sites’ (2008) February *Bulletin of Science, Technology and Society* 20, 33; Sonja Utz and Nicole C Kramer, ‘The Privacy Paradox on Social Networking Sites Revisited: the Role of Individual Characteristic and Group Norms’ (2009) 3(2) *Cyberpsychology: Journal of Psychosocial Research on Cyberspace* 1, 2.

<sup>49</sup> Livingstone, above n 39, 403; JSCCS, above n 9, 8: ‘Often young people choose to be open and expressive. The option of protecting their privacy online often falls by the wayside in favour of wanting to stand out to others online.’

<sup>50</sup> Livingstone, above n 39, 403.

<sup>51</sup> For example, Facebook founder and CEO, Mark Zuckerberg, told a conference in 2010 that social norms around privacy are changing and that ‘[p]eople have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people’. See Bobby Johnson, ‘Privacy No Longer a Social Norm, Says Facebook Founder’, *The Guardian* (online), 11 January 2010, <<http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy>>.

<sup>52</sup> Sameer Hinduja and Justin W Patchin, ‘Personal Information of Adolescents on the Internet: A Quantitative Content Analysis of MySpace’ (2008) 31(1) *Journal of Adolescence* 125, 135.

practice of others posting images of them online was nevertheless an issue. One survey participant made this general observation:

Photos, I believe are a contentious issue because people freely put up photos on social networking sites like Facebook without permission and pretty much assume that if you are in a photo you give permission for a large amount of people to see you.<sup>53</sup>

Concerns held by young people about the posting of images of themselves online by others seem to be attributable in part to the fact that the image, regardless of its nature, has been posted without the image subject's consent.<sup>54</sup> In its 2005 inquiry into unauthorised photography and ancillary privacy issues, SCAG considered a number of factors about the use of photographs that cause harm to the image subject. Although the nature of the image and the context of its use, among others, were common factors causing harm to image subjects, another common factor identified by SCAG was the 'lack of control over one's own image in terms of both the taking of the photograph and the use to which it is put.'<sup>55</sup> It is worth repeating here the extract from a submission made by the NSW Commission for Children and Young People to SCAG, which was referred to at the beginning of this chapter:

Young people suggested to the Commission that a person being photographed should consent to how the photograph should be used. They said that people should have some control over how they are represented on the internet, in the media, or through other forms of mass communication, such as mobile phones.<sup>56</sup>

A fundamental question stemming from this observation, and examined in this thesis, is whether young people should have control over how they are represented on the internet through the medium of images (whether photographic or video). If that question is answered in the affirmative, it gives rise to further questions as to how much control young people should have and what form that control should take. If the use or publication of unwanted images of children and young people is to be regulated, what is it that makes such use or publication worthy of regulation,<sup>57</sup> and what form should that regulation take?

This thesis seeks to answer those questions. However, before clarifying further the research objectives and the specific research questions that will be addressed, it is necessary to clarify and explain the scope of the thesis.

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<sup>53</sup> JSCCS, above n 9, 239 [7.123].

<sup>54</sup> Although it is true to say that the nature of the image is likely to affect the extent to which the 'unauthorised' posting or sharing impacts upon the image subject.

<sup>55</sup> SCAG, above n 7, 12 [51].

<sup>56</sup> NSW Commission for Children and Young People, above n 1.

<sup>57</sup> This question is based on one of the Discussion Questions set out in the SCAG discussion paper: SCAG, above n 7, 3.

### III SCOPE

The focus of this thesis is on the online publication of images of children and young people. In this work, the term 'images' (unless otherwise stated) refers to images that are photographic or videographic in nature, regardless of the medium in which the image is captured or stored and of whether or not the image has been altered or manipulated. However, this thesis does not apply to other forms of representation of likeness, such as portraits, drawings, sculptures and so forth.

References in this work to children and young people is to those who are under 18 years old, consistent with the definition of a 'child' under the *CRC*.<sup>58</sup> However, the term 'young person' or 'young people' is frequently used to better represent older children.<sup>59</sup>

A discussion as to why this research focuses on *images*, as opposed to other forms of information, is set out below. Justification is also given below for focusing only on online publication, and for focusing specifically on children and young people.

#### A Images

Images, whether in photographic or moving form,<sup>60</sup> have a certain undeniable power. They are a vehicle for creating impact, hence the familiar adage that a 'picture is worth a thousand words'. Tushnet writes that images are more vivid and engaging than words, 'decreasing our capacity to assess images critically because we are more involved in reacting to them',<sup>61</sup> and that images have the ability to 'persuade without seeming to persuade'.<sup>62</sup> Research into cyberbullying has consistently found that images are the most impactful form of cyberbullying:<sup>63</sup> one of the reasons given for this by those who experience cyberbullying being the 'concreteness effect' of an image. Images of people in the context of stories of war and struggle are powerful because they put a human face on tragedy and can succeed in permeating public consciousness in a way that words often fail to. Referring to the photograph *Tomako Is Bathed by Her Mother*, depicting a child

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<sup>58</sup> *CRC* art 1 provides that 'a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.'

<sup>59</sup> The ALRC's 2008 Report into Australian Privacy Law and Practice uses the term 'child' for those under 13 and the term 'young person' to refer to those over 13: ALRC, *For Your Information*, above n 4, vol 3, 2221 [FN 1]. The *Children and Young People Act 2008* (ACT) defines a child as a person under 12 years' of age and a young person as being 12 years and over (but not yet an adult): ss 11 and 12 respectively.

<sup>60</sup> As noted above, the term 'image' as used in this thesis includes photographic and videographic images, no matter what format those images are captured or stored in, but does not include other forms of representations of likeness, such as portraiture, drawings, sculptures and so forth.

<sup>61</sup> Rebecca Tushnet, 'Worth a Thousand Words: The Images of Copyright Law' (2012) 125 (3) *Harvard Law Review* 683, 690.

<sup>62</sup> *Ibid* 696.

<sup>63</sup> Peter K Smith et al, 'An Investigation into Cyberbullying, its Forms, Awareness and Impact, and the Relationship between Age and Gender in Cyberbullying' (Research Brief No RBX03-06, University of London, July 2006); Ersilia Menesini, Annalaura Nocentini and Pamela Calussi, 'The Measurement of Cyberbullying: Dimensional Structure and Relative Item Severity and Discrimination' (2011) 14(5) *Cyberpsychology, Behaviour and Social Networking* 267, 268.

born with congenital disease caused by mercury pollution in Japan, Gross et al quote an archivist expressing his view that the photograph 'has done more to raise world consciousness about the effects of pollution than any other image and continues to play a vitally needed educational function.'<sup>64</sup> But even photographs of the relatively mundane can engage the onlooker. As Baroness Hale commented in the case of *Campbell v MGN Ltd* (discussed further below), referring to the supermodel Naomi Campbell, '[s]he makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk.'<sup>65</sup> Lord Hope, in his judgment in *Campbell*, also recognised that images attract the reader in a way that words do not. In response to arguments that publication of photographs was necessary to add credibility to the facts revealed in a news story about Naomi Campbell, Lord Hope commented that '[t]he decision to publish the photographs suggests that greater weight was being given to the wish to publish a story that would attract interest rather than the wish to maintain its credibility.'<sup>66</sup>

Perhaps the power of images lies in the fact that they appear to evidence reality, or truth, in a way that drawings, paintings and words do not. Again, this notion is captured by a familiar adage: 'the camera never lies'. Despite this, there are abundant examples of images being manipulated in order to create a particular impression or effect on the audience. For example, *Time* magazine ran an image of O J Simpson with his skin darkened on its cover, and *Newsweek* 'bestowed digital orthodontia' on an image of septuplet mother Bobbi McCaughey.<sup>67</sup> In the US, two schoolgirls were arrested for stalking after creating a fake Facebook page and posting to it photographs of a minor. The photographs had been doctored so that the subject's face appeared superimposed on a naked body.<sup>68</sup> A respondent to the JSCCS's 'Are you Safe?' survey reported that: '[s]trangers went out of their way to insult a girl repeatedly on the social networking site, Tumblr. Manipulating photos of her using Photoshop and making them embarrassing and humiliating for the girl.'<sup>69</sup>

Images are not only a means of conveying impact, but a means of conveying information (even misinformation).<sup>70</sup> *Campbell* concerned an action brought by the supermodel

<sup>64</sup> Larry Gross, John Stuart Katz and Jay Ruby, 'Introduction: Image Ethics in the Digital Age' in Larry Gross, John Stuart Katz and Jay Ruby (eds), *Image Ethics in the Digital Age* (University of Minnesota Press, 2003) vii, xxiii quoting Gard D Saretzky.

<sup>65</sup> [2004] 2 All ER 995, 1037 [154] ('*Campbell*').

<sup>66</sup> *Campbell* [2004] 2 All ER 995, 1028 [120].

<sup>67</sup> Gross, Katz and Ruby, above n 64, viii.

<sup>68</sup> Daniel Bates, 'The Schoolgirls Arrested for Bullying Their Former Friend with a Fake Facebook page' *Mail Online*, 14 January 2011 <<http://www.dailymail.co.uk/news/article-1347034/Facebook-cyberbullying-Schoolgirls-arrested-creating-fake-page-naked-pictures.html>>.

<sup>69</sup> JSCCS, above n 9, 80 [3.54].

<sup>70</sup> See, eg, *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443 ('*Ettingshausen*') in which the plaintiff argued that a photograph depicting him naked conveyed an imputation that (inter alia) he had 'deliberately permitted a photograph to be taken of him with his genitals exposed for the purposes of

Naomi Campbell in relation to the publication in the press of a number of articles revealing that she was a recovering drug addict and receiving treatment for that addiction. The articles also contained photographs of the supermodel leaving meetings of a support group for recovering addicts. The photographs had been taken covertly, by a photographer employed by a newspaper, for the specific purpose of capturing images of Ms Campbell. Baroness Hale observed that '[p]ublishing the photographs contributed both to the revelation and to the harm it might do'<sup>71</sup> due to the fact that a photograph not only adds impact to the accompanying text, but adds to the information given in those words.<sup>72</sup> This point was also made in *Campbell* by Lord Nicholls who observed that '[i]n general photographs of people contain more information than textual description. That is why they are more vivid. That is why they are worth a thousand words.'<sup>73</sup>

Digital images, moreover, often contain embedded information not observable on the face of the image itself. As is noted in Facebook's Data Use Policy:

We collect the content and other information you provide when you use our Services, including when you sign up for an account, create or share, and message or communicate with others. This can include information in or about the content you provide, such as the location of a photo or the date a file was created.<sup>74</sup>

Images posted online can be linked to information about the image subject — such as where an image is tagged with an individual's name. Moreover, a digital or online image can be used to construct new information, for example, where face recognition technology is used to identify the image subject, or applied to create a 'face print' of the image subject that can be used to identify them from future images. Given the metadata associated with certain images, and the fact that images can be used to create new information (such as face prints), images are potentially very valuable to an organisation. In fact, the photographs on Facebook have been described as its 'most vital assets'.<sup>75</sup> The increasing sophistication of face recognition technology may result in new applications of that technology which increase its commercial value. For example, an advertising agency in the US has recently announced that it is finalising testing of technology that uses face

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reproduction in a publication with a widespread readership.' The judge allowed this imputation to go to the jury which found that that imputation was conveyed by the photograph (and that it was defamatory): David Rolph, *Dirty Pictures: Defamation, Reputation and Nudity* (2005) 10(1) *Law Text Culture* 106. In 2009 Pauline Hanson received a settlement payment and printed apology from the *Sunday Telegraph* following publication by the newspaper of photographs that depicted a naked woman identified as Pauline Hanson. The photographs turned out not to depict Pauline Hanson but someone else. See, eg, Nick O'Malley and Erik Jensen, 'Valuable Lesson from Pauline', *The Sydney Morning Herald* (online), 19 May 2009, <<http://www.smh.com.au/national/valuable-lesson-from-pauline-20090518-bd70.html>>.

<sup>71</sup> *Campbell* [2004] 2 All ER 995, 1037 [154].

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid* 1006 [31].

<sup>74</sup> Facebook, *Data Policy* (29 September 2016) < <https://www.facebook.com/policy.php>>.

<sup>75</sup> Somini Sengupta and Kevin J O'Brien, 'Facebook can ID Faces, but using them grows tricky', *NYTimes* (online), 21 September 2012, <[http://www.nytimes.com/2012/09/22/technology/facebook-backs-down-on-face-recognition-in-europe.html?\\_r=0](http://www.nytimes.com/2012/09/22/technology/facebook-backs-down-on-face-recognition-in-europe.html?_r=0)>.



recognition to automatically identify people captured on cameras installed in shops.<sup>76</sup> Individuals then receive notifications via their smartphones of customised deals in their location. The identification of individuals captured on cameras is made possible through the use of face recognition technology.<sup>77</sup> There are also non-commercial uses of face recognition technology and metadata associated with images. Face recognition can be used by governments and organisations to verify identities for the purpose of security<sup>78</sup> and law enforcement.<sup>79</sup> The value of metadata (which can include but is not limited to data ascertainable from images) was highlighted by Malcolm Turnbull during the introduction of metadata retention legislation into the Australian Parliament in 2014:

Access to metadata plays a central role in almost every counter-terrorism, counter espionage, cyber security, organised crime investigation ... It is also used in almost all serious criminal investigations, including investigations into murder, serious sexual assaults, drug trafficking and kidnapping.<sup>80</sup>

Apart from the existing commercial and security uses of images (or the information that they convey or give rise to), there is an 'ever-present risk that photographs and face prints could be used in the future in ways not currently envisaged.'<sup>81</sup> Images are not only a rich source of information about the image subject, then, but also a *unique* source of potentially very valuable information.

Aside from what they convey, images might also be considered powerful because of what they appropriate. Photographs capture moments in time — they capture people in poses,

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<sup>76</sup> Michael Walsh, 'Facedeals: Facial recognition marketing stirs privacy discussion along with excitement', *Daily News* (online), 15 August 2012 <<http://www.nydailynews.com/news/national/facedeals-facial-recognition-marketing-stirs-privacy-discussion-excitement-article-1.1137240>>.

<sup>77</sup> Individuals authorise the use of an application that compares their image with photographs in which they have recently been tagged on Facebook. Deals are then customised by the application scanning information from the individual's Facebook account: RedPepper, *Check-ins Get a Facelift, Facedeals, Get Personalised Deals*, <<http://redpepperland.com/lab/details/check-in-with-your-face>>.

<sup>78</sup> Such as systems used to control access to physical spaces and computer systems, as well as those used at airports: see generally Thomas Huang, Ziyong Xiong, and Zhenqiu Zhang, 'Face Recognition Applications' in Stan Z Li and Anil Jain (eds) *Handbook of Face Recognition* (Springer-Verlag 2011) 617. For the use of biometrics in passports see Jens-Martin Loebel, 'Is Privacy Dead? GPS-Based Geolocation and Facial Recognition Systems' in David M Hercheui et al (eds), *ICT Critical Infrastructures in Society: 10<sup>th</sup> IFIP TC 9 International Conference on Human Choice and Computers*, International Federation for Information Processing (Springer-Verlag 2012) 342. In a submission to the South Australian Law Reform Institute, The Law Society of South Australia writes that: 'Lawyers in South Australia are required to have their eyes scanned at the State's prisons in order to verify their identity': The Law Society of South Australia, Submission to South Australian Law Reform Institute, *Issues Paper 4: Too Much Information – A Statutory Cause of Action for Invasion of Privacy*, 13 March 2014, 6.

<sup>79</sup> Applications of facial recognition technology for law enforcement include suspect identification and the exclusion of specific individuals from venues, such as casinos: see generally Huang, Xiong, and Zhang, above n 78.

<sup>80</sup> Reported in Matthew Knot, 'Malcolm Turnbull Introduces Legislation for Metadata Retention Scheme' *ABC News* (online), 30 October 2014, <<http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-introduces-legislation-for-metadata-retention-scheme-20141030-11e101.html>>.

<sup>81</sup> Anna Bunn, 'Facebook and Face Recognition: Kinda Cool, Kinda Creepy' (2013) 25 (1) *Bond Law Review* 35, 45.

expressions and situations that may only have been fleeting but which are then preserved, possibly indefinitely, in the form of a photograph or video:

Photographs are refugees from their moment ... Through photographs we have a radical fragment cut off from the unlimited flux. We can have alertness without mind. A perfection of looking without effort ...<sup>82</sup>

In its discussion paper on unauthorised photographs, SCAG observed that ‘while a person might be comfortable presenting themselves in a particular way on a beach, a photograph, which facilitates a permanent image, provides a broader context for those images’<sup>83</sup> and may allow for ‘ongoing objectification of the subject, and therefore ongoing harm.’<sup>84</sup> Westin has described the impact of being photographed, filmed or subject to surveillance in terms of individuals no longer being able to ‘merge into the “situational landscape”’,<sup>85</sup> and in *Douglas & Ors v Hello! Ltd & Ors* the court described photographs as a particularly intrusive means of invading privacy.<sup>86</sup>

One commentator has described the camera as ‘a machine [that] ... “takes” what is put in front of it. It captures its subject without further judgement.’<sup>87</sup> The idea that photographs take something of or even from their subject is underpinned by the notion that one’s image is ‘an essential attribute of the human persona, reflecting one’s soul and uniqueness.’<sup>88</sup> That view was expressed by the French legal scholar Fougerol in 1913:

Human physiognomy, a mysterious and quasi-divine thing, incarnates not only what we like best, what we appreciate most: the external visible form, but it also permits to the thoughts, deprived of any shape, to exteriorize themselves according to the desires of men ... This physiognomy ... reflects the soul and distinguishes the man from his fellow-man ...<sup>89</sup>

Similar sentiments were expressed by the European Court of Human Rights (‘EctHR’) in *Reklos and Davourlis v Greece*, a case involving a photograph taken of a new-born Greek baby without the consent or knowledge of the parents.<sup>90</sup> The EctHR expressed the view that a person’s image constitutes one of the chief attributes of his or her personality as it ‘reveals the person’s unique characteristics and distinguishes the person from his or her peers.’<sup>91</sup> According to the court, the right to protection of one’s image is one of the

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<sup>82</sup> Halla Beloff, *Camera Culture* (Basil Blackwell, 1985), 9.

<sup>83</sup> SCAG, above n 7, 9 [33].

<sup>84</sup> Ibid 12, 13 [54].

<sup>85</sup> Westin, above n 46, 31.

<sup>86</sup> *Douglas & Ors v Hello! Ltd & Ors* [2006] QB 125, [84] (Lord Phillips MR).

<sup>87</sup> Beloff, above n 82, 23.

<sup>88</sup> Elisabeth Logeais and Jean-Baptiste Schroeder, ‘The French Right of Image: An Ambiguous Concept Protecting the Human Persona’ (1998) 18 *Loyola of Los Angeles Entertainment Law Journal* 511, 511.

<sup>89</sup> H. Fougerol, *La Figure Humaine et le Droit* (The Human Face and the Law) (1913) 4, cited by Wencelas J Wagner, ‘The Right to One’s Own Likeness in French Law’ (1970) 46(1) *Indiana Law Journal* 1, 1.

<sup>90</sup> (European Court of Human Rights, Chamber, App No 1234/05, 15 January 2009) (‘*Reklos*’).

<sup>91</sup> *Reklos* (European Court of Human Rights, Chamber, App No 1234/05, 15 January 2009) [40].

essential components of personal development and ‘presupposes the right to control the use of that image.’<sup>92</sup> In a like vein, Ravanas’s description of the moral prejudice occasioned by an unwanted photograph was cited by the Supreme Court of Canada in the case of *Aubry v Éditions Vice-Versa*:

The camera lens captures a human moment at its most intense, and the snapshot ‘defiles’ that moment. The privileged instant of personal life becomes the ‘this object image offered to the curiosity of the greatest number’. A person surprised in his or her private life by a roving photographer is stripped of his or her transcendence and human dignity, since he or she is reduced to the status of a ‘spectacle’ for others ... This ‘indecent of the image’ deprives those photographed of their most secret substance.<sup>93</sup>

Legal protection of a person’s image is traditionally stronger in civil law jurisdictions.<sup>94</sup> In France the right to one’s image is regarded as a species of personality right that has ‘emerged from the shadow of the right to privacy.’<sup>95</sup> In Germany, a general right of personality is recognised in the Civil Code and the German Constitution, and includes the right to one’s image — that is the right to decide ‘whether and under what conditions others may take one’s photograph.’<sup>96</sup> In *Aubry*, the Supreme Court of Canada held that the right to one’s image is an aspect of the right to privacy under the Quebec Charter of Human Rights and Freedoms. Accordingly, the court found that because the right to privacy guaranteed under the Charter was designed to protect a sphere of individual autonomy — that is ‘the control each person has over his or her identity’<sup>97</sup> — that right must include the ability to control the use made of one’s image, where the image subject is recognisable.<sup>98</sup> In certain civil law jurisdictions, there is also some support for one’s likeness in general, or one’s image in particular, to be regarded as a form of property right.<sup>99</sup>

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<sup>92</sup> Ibid.

<sup>93</sup> J Ravanas, ‘La Protection des Personnes Contra la Realisation et la Publication de Leur Image’ (1978) as cited in *Aubry v Éditions Vice-Versa* [1998] 1 SCR 591 [69] (‘Aubry’).

<sup>94</sup> NSWLRC, *Invasion of Privacy*, Consultation Paper No 1 (2007) 124 [5.2].

<sup>95</sup> Logeais and Schroeder, above n 88, 515 and referring to the French decision in *Papillon* see also Jeanne M Hauch, ‘Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris’ (1994) 68 *Tulane Law Review* 1219, 1223: ‘the French right of privacy coexists with a separate right of monopoly over exploitation of one’s image, name, and notoriety.’

<sup>96</sup> Judith Janna Mårten, ‘Personality Rights and Freedom of Expression: A Journey through the Development of German Jurisprudence under the Influence of the European Court of Human Rights’ (2012) 4(2) *Journal of Media Law* 333, 334.

<sup>97</sup> *Aubry* [1998] 1 SCR 591 [52].

<sup>98</sup> Ibid [52]–[53].

<sup>99</sup> See, eg, Mårten, above n 96, 334 referring to the fact that section 22 of the *Copyright Act* provides that images may ‘only be disseminated or shown in public with the express approval of the person concerned’ — albeit that this general rule is subject to a number of exceptions. In relation to France, see, eg, Wencelas J Wagner, above n 8989. However, Wagner argues that the property theory has never been fully accepted in French law and ‘must now be considered as having little vitality’. He refers to comments in *T v DuLaar* where the Tribunal said ‘[t]he right to prohibit the reproduction and the publication of one’s likeness cannot be assimilated to a property right, the human person not being in the commerce and being unable to be the subject matter of a right *in rem*’ (citations omitted).

In the US context, the right to publicity has traditionally been formulated as a right to protect against *commercial* exploitation of one's image, and is thus seen as functioning to protect or further a person's economic interests.<sup>100</sup> Haemmerli, however, has argued that the right to publicity should be reformulated as a property right that can protect a person's moral interests.<sup>101</sup> She argues that 'property is inseparably associated with one's "personhood"' and that there is 'no reason why a person should not and every reason why a person should be able to claim a property right in the use of his/her objectified identity':

if one's own image, for example, is treated as an object capable of 'being yours or mine', why should it not be claimed by the person who is its natural source? To the extent it is available as some person's property — and if viewed as an object, it must be so available — its source would seem to have the strongest claim. That claim would also necessarily be prior to others' in both temporal and qualitative terms. The connection between a person and her physical characteristics is innate. It therefore logically precedes that of any particular physical manifestation of the image or any manipulation of it by others. This is essentially a first-occupancy argument, based on the idea that a person is first to 'arrive' at his own persona and thus at objectifications of it.<sup>102</sup>

The innate connection, referred to by Haemmerli, between a person and their physical characteristics might explain why many individuals believe they have a strong moral claim to the way their persona is represented, or objectified, by way of an image. Moral claims to one's image (or the way one is represented) are often asserted regardless of whether the capture or use of the image is experienced as a violation of a 'right to privacy', or whether it manifests in physical, mental or emotional harm. The idea of a 'moral claim' over how we are represented, visually, may go some way to explaining why the unwanted use of one's image can be experienced as a violation of one's autonomy — as will be discussed in Chapter Two. It may also explain why people feel, among other things, 'violated' and 'hurt' upon being photographed, or discovering photographs of themselves being published without their knowledge and consent.<sup>103</sup>

In summary, then, this thesis focuses on images, as opposed to other forms of information, because images have a peculiar impact beyond other types of personal information; they are capable of creating interest and are often perceived as representing 'truth' or 'reality', even though they can be manipulated to misrepresent the truth. Images form a rich and unique source of information about the image subject and capture

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<sup>100</sup> Alice Haemmerli, 'Whose Who? The Case for a Kantian Right of Publicity' (1999) 49(2) *Duke Law Journal* 383; Rosina Zapparoni, 'Propertising Identity: Understanding the United States Right of Publicity and its Implications — Some Lessons for Australia' [2004] 28(3) *Melbourne University Law Review* 690, 700-02.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid 418.

<sup>103</sup> Jessica Lake, 'Is it Ok for People to Take Pictures of You in Public and Publish Them?' *The Conversation* (Arts and Culture) (27 May 2014) <<https://theconversation.com/is-it-ok-for-people-to-take-pictures-of-you-in-public-and-publish-them-27098>>.

particular moments in time, or a series of moments, but form an often permanent record that can then be used to replay that moment out of context. There is an innate connection between a person and his or her 'self' such that images can be regarded as communicating something *about* the image subject beyond how he or she looks. This innate connection can give rise to a sense of moral entitlement to the way in which one's representation is used. It is for all of these reasons that, as is argued in Chapter Two, the publication of images of children gives rise to the risk of developmental harm beyond that posed by the publication of other types of information about a child and which make images deserving of special consideration.

## B *Images and the Internet*

The inherent power of an image is greater still when that image is disseminated through print or audio-visual media. As long ago as 1890, Warren and Brandeis, in their seminal paper 'The Right to Privacy', wrote that 'numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops".'<sup>104</sup> More recently, in *Peck v United Kingdom*,<sup>105</sup> images of a man caught on CCTV camera attempting to commit suicide by cutting his wrists later published in newspapers and on television were the subject of a legal action in the EctHR.<sup>106</sup> The court was of the view that the images resulted in the relevant moment 'being viewed to an extent which far exceeded any exposure to a passer-by or to security observation ... and to a degree surpassing that which [he] could possibly have foreseen.'<sup>107</sup> The internet, however, provides a broader context for images than even print and broadcast media. The EctHR in its decision in *Von Hannover v Germany* has warned that 'increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data.'<sup>108</sup> More recently, the ECtHR has made the following observations about the internet:

The Court has held that the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of

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<sup>104</sup> Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 194.

<sup>105</sup> [2003] I Eur Court HR 123 ('*Peck*').

<sup>106</sup> *Peck* [2003] I Eur Court HR 123. The application was brought on the basis that the publication of the images constituted a serious invasion of the applicant's right to respect for his private life under Articles 8 and 13 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) ('*ECHR*').

<sup>107</sup> *Ibid* 144.

<sup>108</sup> *Von Hannover v Germany* [2004] IV Eur Court HR 41, 71.

human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press.<sup>109</sup>

The ubiquity of the internet and the level of exposure afforded by online publication means that an image that in the past may have resided in relative obscurity can now potentially be viewed by millions for an indefinite period of time. The size or potential size of the audience where an image is posted on the internet is one of the reasons that online images are considered such an impactful form of cyberbullying.<sup>110</sup> The potential for such a large audience can, as noted by the Law Commission of New Zealand, cause distress even where the image itself is not inherently intimate or embarrassing.<sup>111</sup> There are also frequent reports of home videos posted on video sharing sites such as YouTube going ‘viral’ and being viewed and shared by thousands. What may have been intended as an amusing (or embarrassing) video to be viewed by friends and acquaintances has, in fact, been viewed by strangers on all sides of the planet.<sup>112</sup> Unwanted online publication of an image or its subsequent use can therefore result both in access by unwanted audiences<sup>113</sup> as well as a sense of fear, on the part of the image subject, of access by unwanted audiences.<sup>114</sup>

Aside from the fact that the internet provides such a broad context for images (a factor that has been termed ‘scalability’<sup>115</sup>), online publication raises concerns about the permanence, or persistence, of information. As the Hon. Michael Kirby once said: ‘in the age of the internet, stories that once would have been wrapping the fish and chips and

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<sup>109</sup> *Węgrzynowski v. Poland* Application No 33846/07, European Court of Human Rights, Chamber (16 October 2013) citing *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, no 33014/05, § 63, *ECHR* 2011 (extracts).

<sup>110</sup> Slonje and Smith, above n 28, 149. The European Court of Human Rights has specifically taken into account the fact that the internet, through its worldwide reach and accessibility, is able to create ‘major impact’: Marga M Groothuis, ‘The Right to Privacy for Children on the Internet: New Developments in the Case Law of the European Court of Human Rights’ Simone van der Hof, Bibi van den Berg and Bart Schermer (eds) *Minding Minors Wandering the Web: Regulating Online Child Safety* (Springer, 2014 (24)) 143, 149.

<sup>111</sup> Law Commission (New Zealand), *Privacy: Concepts and Issues, Review of the Law of Privacy Stage 1*, Study Paper 19 (2008), 132 [6.37].

<sup>112</sup> One example is the YouTube video referred to as ‘Charlie bit my finger’, which, according to a Facebook page with the same name, is an ‘Internet viral video famous for once being the most viewed You Tube video of all time with over 221 million hits.’ The video was apparently uploaded onto YouTube only so that it could be watched by the boys’ godfather overseas and the video clip was too large to send by email. The boys’ father comments that ‘The clip only went up as I wanted to share it with the boys’ godfather. I was naive about the whole YouTube thing. It became viral and once that happened there was nothing I could do.’ See *Charlie Bit My Finger*, Facebook <<http://www.facebook.com/pages/Charlie-Bit-My-Finger/103120353061157>>.

<sup>113</sup> See, eg, the example of Penny’s photograph provided by Raynes-Goldie in her thesis: Raynes-Goldie, above n 42, 201.

<sup>114</sup> Tufeccki, above n 48, 24. The NSW Commission for Children and Young People notes that ‘[a]s young people have told the Commission, it is often not the taking of photographs that is a concern, rather how photographs are used, or the fear of how they will be used’ (emphasis added): NSW Commission for Children and Young People, above n 1, 3 [5.3].

<sup>115</sup> danah boyd, *Taken Out of Context: American Teen Sociality in Networked Publics* (PhD Thesis, University of California, 2008) 33; Raynes-Goldie, above n 42, 69.

been forgotten a few weeks or months or years later, are preserved forever.’<sup>116</sup> In a similar vein, de Andrade has observed that ‘[w]hat we post on the internet becomes a kind of tattoo attached to ourself, hard and cumbersome to remove.’<sup>117</sup> According to Tufeki, the persistence of online information ‘shifts the temporal boundaries such that the audience can now exist *in the future*.’<sup>118</sup> Numerous concerns have been expressed about the consequences of the persistence of online information. Allen has argued that people have a ‘legitimate moral interest in distancing themselves from commonplace misfortunes and errors’ and that without the ability to escape the past, feelings can be hurt and lives ruined.<sup>119</sup> Particular concerns have been expressed, in this regard, about the future consequences of the perceived ‘over-sharing’ of personal information by or about children and young people and the future impact of youthful indiscretion.<sup>120</sup> Mayer-Schönberger has argued that memory impedes the ability of individuals to change: ‘by recalling forever each of our errors and transgressions, digital memory rejects our capacity to learn from them, to grow and to evolve.’<sup>121</sup> In this sense, forgetfulness is ‘seen as fundamental to the development of self and identity, as well as to the capacity of individuals to make effective decisions.’<sup>122</sup> Others express concerns not only about the future impact of the persistence of information but also about the *present consequences* of that persistence. Blanchette and Johnson have argued that the fear of persistent information may cause individuals to behave differently and hesitate to act or speak authentically.<sup>123</sup>

Other concerns about the persistence of digital memory relate to what is presently unknown.<sup>124</sup> Thus, as Graux et al have pointed out ‘[e]specially in today’s information society, it is practically impossible to predict all (negative) consequences of the use of

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<sup>116</sup> Michael Kirby, ‘Privacy, MySpace, YouTube and Facebook: Can the Law Cope?’ (Speech delivered at Office of the Victorian Privacy Commissioner, Melbourne, 1 September, 2009) <https://www.privacy.vic.gov.au/privacy/web2.nsf/files/michael-kirby-privacy-oration> 3.

<sup>117</sup> Noberto Nuno Gomes de Andrade, ‘Oblivion: The Right to be Different ... from Oneself. Reproposing the Right to be Forgotten’ (2012) 13 *IDP (Revista De Internet, Derecho Y Política)* 122, 134.

<sup>118</sup> Tufeki, above n 48, 22 (emphasis in original).

<sup>119</sup> Anita L Allen, ‘Dredging up the Past: Lifelogging, Memory and Surveillance’ (2008) 75(1) *The University of Chicago Law Review* 47, 57.

<sup>120</sup> Raynes-Goldie, above n 42, 12-13.

<sup>121</sup> Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009) 5, 125.

<sup>122</sup> Anna Bunn, ‘The Curious Case of the Right to be Forgotten’ (2015) 31 *Computer Law & Security Review* (references omitted).

<sup>123</sup> Jean-François Blanchette and Deborah G Johnson, ‘Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness’ (2002) 18 *The Information Society* 33, 36. See also Hogan, ‘The Presentation of Self in the Age of Social Media: Distinguishing Performances and Exhibitions Online’ (2010) 30(6) *Bulletin of Science, Technology and Society* 377, 378; Susannah Stern, ‘Producing Sites, Exploring Identities: Youth Online Authorship’ in David Buckingham (ed) *Youth, Identity, and Digital Media* (MIT Press, 2008) where Stern describes situations in which the reactions of visitors to online presentations of themselves instigated a change in self-concept, self-presentation and ultimately (in some cases) the author’s offline behaviour.

<sup>124</sup> Bunn, ‘Right to be Forgotten’, above n 122, (references omitted).

personal data. And even if one can foresee a few, they tend to be abstract, distant and uncertain.’<sup>125</sup>

Aside from what has been described as the ‘iron memory’ of the internet,<sup>126</sup> other aspects of the architecture of the internet give cause for concern. Those aspects include the fact that information, once online, can be indexed, searched and combined with other information about a particular individual. As Viviane Reding, European Commission Justice Commissioner, has observed: ‘The Internet has an almost unlimited search and memory capacity. So even tiny scraps of personal information can have a huge impact, even years after they were shared or made public.’<sup>127</sup> The capabilities of search engines to link together even ‘tiny scraps’ of personal information was at issue in the case of *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*.<sup>128</sup> Here the European Court of Justice noted that the inclusion of links in a search page following a search against an individual’s name allowed internet users to obtain, through the list of results

a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him.<sup>129</sup>

According to the New Zealand Law Reform Commission, concerns about the online posting of images may be accentuated by the development of face recognition search engines and the linking, or tagging, of images with names and other data about the image subject.<sup>130</sup> Indeed Facebook has recently been subject to scrutiny by European privacy regulators<sup>131</sup> and subject to public criticism<sup>132</sup> for setting as the default position the automatic scanning and tagging of photographs using face recognition software. One of the consequences of the advances in facial recognition technology was illustrated in an

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<sup>125</sup> Graux, Ausloos and Valcke, above n 41, 12.

<sup>126</sup> Bert-Jaap Koops, ‘Forgetting Footprints, Shunning Shadows: A Critical Analysis of the Right to be Forgotten in Big Data Practice’ (2011) 8(3) SCRIPTed 1, 2 <<https://script-ed.org/wp-content/uploads/2011/12/koops.pdf>>.

<sup>127</sup> Vivian Reding, ‘The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age’ (Press Release, Speech/12/26, 24 January 2012), 5.

<sup>128</sup> (Case C-131/12, 13 May 2014) [2014] QB 1022 (European Court of Justice) 1074 (‘Google’).

<sup>129</sup> *Google* (Case C-131/12, 13 May 2014) [2014] QB 1022 (European Court of Justice) 1074, [80].

<sup>130</sup> Law Commission (New Zealand), above n 111, 133 [6.40].

<sup>131</sup> ‘Germany reopens Facebook facial recognition probe’, *BBC News* (online), 16 August 2012 <<http://www.bbc.co.uk/news/technology-19274341>>.

<sup>132</sup> Christopher Williams, ‘Facebook facial recognition system criticised’, *The Telegraph* (online), 8 June 2011 <<http://www.telegraph.co.uk/technology/facebook/8563464/Facebook-facial-recognition-system-criticised.html>>.



experiment conducted by researchers from Carnegie-Mellon University.<sup>133</sup> The researchers asserted that a combination of publicly available Web 2.0 data (such as photographs posted to Facebook), cloud computing, data mining, and face recognition software was 'bringing us closer to a world where anyone may run face recognition on anyone else, online and offline — and then infer additional, sensitive data about the target subject, starting merely from one anonymous piece of information about her: the face.'<sup>134</sup> The broader consequences of this experiment for privacy and security are manifold.<sup>135</sup> In an interview with the Wall Street Journal, Google CEO Eric Schmidt was quoted as saying: 'I don't believe society understands what happens when everything is available, knowable and recorded by everyone all the time', and went on to predict that young people may in the future automatically be entitled to change their name to 'disown youthful hijinks stored on their friends' social media sites'.<sup>136</sup> However, as Acquisti et al point out, it is one thing to change one's name but quite another to change one's face.<sup>137</sup>

The online environment also provides opportunities for individuals to post information about others, including images, while remaining anonymous. The JSCCS notes that the ability to remain anonymous may encourage young people to behave online in a way that they would not behave offline

because anonymity affords them the opportunity to act on any anti-social impulses that might otherwise be tempered in public. Children, in particular, are 'more likely' to bully in the online environment because they are able to hide their identities. Those who are bullied physically and feel powerless go online feeling totally empowered.<sup>138</sup>

Aside from the fact that anonymity may encourage behaviour online that would not have been indulged in offline, there is also the fact that the audience for online information is, for the large part, anonymous. This unknown audience may add to the harm suffered by an image subject when an image is published or shared online without that person's authorisation.<sup>139</sup> One reason for this is that it is difficult for a person to manage an audience, or to tailor the impressions they create for a particular audience, when that audience is unknown and potentially quite diverse. In turn, this gives rise to the potential for 'bad impressions' to be created and maintained that can affect a person's job prospects and their own self-esteem. This is explored further in Chapter Two. Another

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<sup>133</sup> Alessandro Acquisti, Ralph Gross and Fred Stutzman, *Faces of Facebook: Privacy in the Age of Augmented Reality*, Face Recpgrmotopm Study – FAQ, 4 August 2011, <<http://www.heinz.cmu.edu/~acquisti/face-recognition-study-FAQ>>.

<sup>134</sup> Bunn, 'Facebook and Face Recognition', above n 81, 41 referring to research conducted by Acquisti, Gross and Stutzman, above n 133.

<sup>135</sup> ALRC, *For Your Information*, above n 4, vol 1, 408–409 [9.71].

<sup>136</sup> Bianca Bosker, 'Google CEO Eric Schmidt Advises You to Change Your Name to Escape Online Shame,' *Huffington Post* (online), 17 August 2010 <[http://www.huffingtonpost.com/2010/08/16/google-ceo-eric-schmidt-s\\_n\\_684031.html](http://www.huffingtonpost.com/2010/08/16/google-ceo-eric-schmidt-s_n_684031.html)>.

<sup>137</sup> Acquisti, Gross and Stutzman, above n 133.

<sup>138</sup> JSCCS, above n 9, 74 [3.48].

<sup>139</sup> Tufekci, above n 48, 22; JSCCS, above n 9, 232 [7.103].

reason may be that where an audience for a particular image is unknown, an image subject is likely to be more fearful of who might see the image, and how they might react.<sup>140</sup>

Another distinctive feature of information in an online environment is identified by boyd as 'replicability'. That is, content can easily be duplicated and 'altered in ways that people do not easily realize'.<sup>141</sup> The ease with which content can be duplicated makes it more difficult to determine the authenticity and source of the information.<sup>142</sup>

Online publication of personal information, including images, therefore raises particular concerns due to the persistence, scalability, searchability and replicability of online information, as well as the potential for anonymity on the part of those posting, viewing, sharing and using the personal information of others. In addition, the internet presents unique challenges to regulators. While the internet might no longer be properly described as entirely 'borderless',<sup>143</sup> it nevertheless represents a new realm and, according to Lessig, 'demands a new understanding of how regulation works', an understanding that 'compels us to look beyond the traditional lawyer's scope — beyond laws, or even norms. It requires a broader account of "regulation", and most importantly, the recognition of a newly salient regulator.'<sup>144</sup> That newly salient regulator is the architecture of the internet or, in Lessig's terms, its 'code'.<sup>145</sup>

The choice of focus for this research, being images published online, should not be taken to suggest that the conclusions made about the risk of developmental harm, or the proposed solutions, can or should apply only to online images. Some of these findings may well be relevant to the publication of images more broadly. Certainly in terms of the risk of developmental harm, the challenges of other modes of dissemination and publication — such as the sending of images from one mobile phone to another — are very real.<sup>146</sup> In addition, images published in one medium (for example, in a newspaper) are also very often published in an online medium simultaneously, or subsequently. Moreover, in terms of law reform options that could address the risks associated with the capture or publication of images, many have cautioned about the need to adopt a technology-neutral approach in order to 'future proof' any such reforms in the face of advances in technology

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<sup>140</sup> Slonje and Smith, above n 28, 153.

<sup>141</sup> danah boyd, 'Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications' in Zizi Papacharissi (ed), *A Networked Self: Identity, Community, and Culture on Social Network Sites* (Routledge, 2011) 47.

<sup>142</sup> danah boyd, *Taken Out of Context*, above n 115, 30.

<sup>143</sup> Dan Svantesson, 'Protecting Privacy on the Borderless Internet – Some Thoughts' (2007) 19(1) *Bond Law Review* 168, 178.

<sup>144</sup> Lawrence Lessig, *Code 2.0* (Basic Books, 2006), 5.

<sup>145</sup> Ibid.

<sup>146</sup> See, eg, Centre for Internet Safety, Submission to Australian Government, *Enhancing Online Safety for Children*, March 2014, 3; Srivastava, Gamble and Boey, above n 24, 21, 28 noting that the cyberbullying occurred primarily through the use of instant messaging, mobile phones and social networking sites.

and practice.<sup>147</sup> On the other hand, it is suggested here that for all the reasons identified above, the internet poses unique threats and challenges due, in most part, to its architecture. A focus on online publication, therefore, allows the researcher to consider and address these peculiar problems and threats, not least among which are the challenges of regulating this new realm.<sup>148</sup> Finally, a focus on online publication allows research to address the source of what has been described as ‘understandable anxiety’ about the future in a networked world. As Chris Kelly, former Chief Privacy Officer at Facebook, once observed:

I think we’re at an interesting time in the history of the world when a lot of things that weren’t recorded or captured in any form are being captured [and shared] — and people are understandably nervous about that.<sup>149</sup>

### C *Children and Young People*

The focus of this research is on children and young people under the age of 18 years. One of the reasons for focusing on children is that particular concerns have been raised around the capture and use of images of children and young people without their consent. These concerns have, in large part, been attributed to the increasing use in mobile or digital technology.<sup>150</sup> The issue of unauthorised capture and use of images of children has given rise to concerns about children’s safety,<sup>151</sup> as well as their privacy.<sup>152</sup> Children and young people themselves have expressed their desire for control over personal information, as noted above, and have expressed a view that they are particularly concerned about the practice of the taking of unauthorised photographs that focus on a person or a small group without the consent of the image subject/s.<sup>153</sup> Australia’s obligations under the *CRC*

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<sup>147</sup> See, eg, in relation to surveillance devices law reform ALRC, *Serious Invasions of Privacy*, above n 38 [Recommendation 14-2]; in relation to privacy principles that apply to the handling of personal information see ALRC, *For Your Information*, above n 4, vol 1, 422 [10.9]. In relation to proposals to improve online safety for children, the Australian Library and Information Association (‘ALIA’) submission to the Bill noted that ‘legislation that is specific to current online practices risks becoming outdated: ALIA, Submission in Response to Australian Government Enhancing Online Safety for Children Bill, January 2015, 3.

<sup>148</sup> As noted by Livingstone and O’Neill, the dominant liberal discourse posits that the internet cannot easily be regulated through law but that, as the ‘Internet and surrounding debates have matured, there is growing acceptance that diverse forms of governance, including but not only national or international intervention, are required to facilitate online opportunities while also reducing or managing the associated risks’: Sonia Livingstone and Brian O’Neill, ‘Children’s Rights Online: Challenges, Dilemmas and Emerging Directions’ in Simone van der Hof, Bibi van den Berg and Bart Schermer (eds) *Minding Minors Wandering the Web: Regulating Online Child Safety* (Springer, 2014 (24)) 19, 21. It has also been argued that the ‘borderless internet’ may be transformed into ‘something that more resembles our physical world’ as the use of geo-identification techniques becomes more widespread: see Dan Svantesson, above n 143, 178.

<sup>149</sup> Asher Moses, ‘Facebook Privacy Story a Beat-Up’, *The Sydney Morning Herald* (online), 20 February 2009, <<http://www.smh.com.au/articles/2009/02/20/1234633030903.html>>, quoting Chris Kelly, (now former) Chief Privacy Officer of Facebook.

<sup>150</sup> ALRC, *For Your Information*, above n 4, vol 3, 2326 [69.106], 2327 [69.112].

<sup>151</sup> See, eg, Department of Communications (Cth), above n 22.

<sup>152</sup> ALRC, *Serious Invasions of Privacy*, above n 38 (generally).

<sup>153</sup> NSW Commission for Children and Young People, above n 1, 2 [3.2].

require due weight to be given to the views of children in accordance with the age and maturity of the child.<sup>154</sup>

In so far as the unwanted online publication of images of children, or their subsequent use, gives rise to the risk of developmental harm, as is argued in Chapter Two, children must be considered especially vulnerable because much formative development, particularly in relation to identity and self-concept, occurs during childhood and adolescence.<sup>155</sup>

Children are also vulnerable to the risk of harm posed by the unwanted online posting of images of themselves, or their subsequent use, due to their level of interaction with and immersion in the online environment.<sup>156</sup> A report by ACMA in 2009 observed that for young people in their high school years, the use of online social media sites in particular plays an important role in 'self-expression, "fitting-in", chatting with people they know and also people they do not necessarily know offline.'<sup>157</sup> Commenting on the place of user-generated social media services<sup>158</sup> in the lives of teenagers, ACMA notes that these services

play a large role in teenagers' efforts to conform to group norms and culture, and develop and maintain social currency. These services allow teenagers to keep up with topics of conversations at school, and to feel they are part of the mainstream teenage culture, as there is a general perception that all teenagers are on at least one of the social networking services.<sup>159</sup>

Given that children are such avid users of the internet, and teenagers such avid users of social networking sites, the potential for a photograph or video of a child or young person to be uploaded, shared or used online, without their permission, is significant. As noted above, research conducted in 2007 found that 40% of the young Australians who participated reported that photos and videos had been posted to the internet without their consent.<sup>160</sup> The need for particular focus to be directed towards the issues arising from and risks posed by the online posting of images of children and young people is reflected in the observation made by EU Kids Online in its submission to Committee on the Rights of the Child's 2014 Day of General Discussion on Digital Media and Children's Rights: '[w]hile younger children have fewer resources to cope with online risk, they are also more willing to turn to parents for help. Meanwhile, teenagers face particular risks

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<sup>154</sup> CRC art 12(1).

<sup>155</sup> This is discussed further in Chapter Two, Part Four.

<sup>156</sup> JSCCS, above n 9, 5 [1.2].

<sup>157</sup> Ibid 5 [1.2].

<sup>158</sup> ACMA defines a social networking service as an 'online social network for communities of people who share interests and activities, or who are interested in exploring the interests and activities of others': ACMA, above n 40, 21 [4.6]. Examples of popular social networking services given by ACMA include 'Bebo, Club Penguin, Facebook, MSN Messenger and MySpace': JSCCS, above n 9, 21 [4.6].

<sup>159</sup> JSCCS, above n 9, 27.

<sup>160</sup> ALRC, *For Your Information*, above n 4, vol 3, 2225, [67.12].

and they may struggle alone, so they need particular support.’<sup>161</sup> EU Kids Online also cautions the need for policymakers to be ‘continually alert to new risks that affect children, especially arising from peer-to-peer contact.’<sup>162</sup> It has also been observed that the internet is ‘largely blind to age, treating children and adults equally.’<sup>163</sup>

Children may also be more vulnerable than adults to photographs being captured of them, and subsequently used. As noted by the NSW Children’s Commissioner:

Children ... are more likely to have fewer concerns than adults about their privacy in public and be more trusting of someone wishing to take their photograph. Children and young people are used to obeying adults or being required to obey adults, for example, in school or family settings. Therefore, they are less likely to question or challenge an adult they don’t know who is taking a photograph of them. The risk that photographs may be used in an exploitative or offensive way is possible and clearly not in their best interests.<sup>164</sup>

Hughes has advanced two reasons that justify examining children’s position vis-a-vis a right of privacy separately from that of adults.<sup>165</sup> Firstly, Hughes suggests that children have different privacy needs at different stages of their development and may have different needs to adults.<sup>166</sup> Secondly, the child’s right to privacy ‘tends to clash with more rights and interests than an adult’s right of privacy’, not least because there are a number of actors in child privacy cases, including the child’s parents.<sup>167</sup> In terms of the particular issues surrounding the unauthorised capture or use of images, it is suggested that Hughes’ observations are apt. While Hughes is referring to privacy in general, rather than the issue of the unauthorised capture and use of images specifically, the unauthorised capture and use of images is often treated as a privacy issue, and can certainly be conceptualised as such by reference to control or access based definitions of privacy.<sup>168</sup> In terms of rights more generally, Livingstone and O’Neill have remarked that there has been only partial progress made in supporting children’s rights online and that in debates about the governance of information and communication technologies the interests of children ‘figure unevenly and can prove surprisingly contentious.’<sup>169</sup>

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<sup>161</sup> EU Kids Online, Written Submission to the Committee on the Rights of the Child 2014 Day of General Discussion: Digital Media and Children’s Rights, 10 August 2014, 3.

<sup>162</sup> Ibid 2.

<sup>163</sup> Committee on the Rights of the Child, *Report of the 2014 Day of General Discussion: Digital Media and Children’s Rights*, 4 [13]<[http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2014/DGD\\_report.pdf](http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2014/DGD_report.pdf)>.

<sup>164</sup> NSW Commission for Children and Young People, above n 1, 3.

<sup>165</sup> Kirsty Hughes, ‘The Child’s Right to Privacy and Article 8 *European Convention on Human Rights*’ in Michael Freeman (ed) *Current Legal Issues: Law and Childhood Studies* (Vol 14) (Oxford University Press) 456, 458–60.

<sup>166</sup> Ibid 457.

<sup>167</sup> Ibid.

<sup>168</sup> Westin, above n 46; Altman, above n 46; Van Den Haag, above n 46 and Allen, above n 46.

<sup>169</sup> Livingstone and O’Neill, above n 148, 20.

#### IV RESEARCH QUESTIONS AND OBJECTIVES

The research proposes that Australian law should be reformed to give children greater control over their image in the online environment than they currently enjoy. In that context, the following questions will be addressed:

1. Why do children need greater control over their image in the online environment than they currently enjoy under Australian law?
2. What is the justificatory basis for a legal response to address the need for children to have greater control over their online image than they currently enjoy and what form could that response take?

In answering the first research question, this research has the following objectives:

- (1) To critically evaluate research relating to the effect on child development of the unwanted publication or use of an image, particularly where the image is published online.
- (2) To identify the extent to which the legal and regulatory framework in Australia gives children the ability to control the use or publication of their image, particularly in the online context. To meet this objective by considering:
  - (a) The extent to and way in which the legal and regulatory framework extant in Australia governs the publication or use of images in general, and images of children in particular, specifically in the online context.
  - (b) The extent to which legal remedies facilitate the withdrawal of an image from publication.
  - (c) Practical issues regarding access to formal legal mechanisms by children and young people in so far as these issues can be expected to impact upon the control a child or young person actually has.
- (3) To consider the extent to which non-legal mechanisms give children the ability to control the use or publication of their image, particularly in the online context. To meet this objective by:
  - (a) Considering the extent to which the reporting mechanisms of internet content hosts<sup>170</sup> provide for the removal of images of a child at the behest of the image subject, or in response to a request on their behalf.
  - (b) Identifying social norms extant in Australia, as well as market conditions and the architecture of the internet, that govern the publication of images in general, or their subsequent use, and images of children in particular.

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<sup>170</sup> As that term is defined in the *Broadcasting Services Act 1992* (Cth) sch 5, cl 91(1)(b). An internet content host is defined broadly, in sch 5, cl 3, as a 'person who hosts internet content in Australia'. See further the list of Defined Terms in this thesis.

- (4) To consider the issue of unwanted online publication of images of children, or their subsequent use, from a child rights perspective, taking into account Australia's commitments under the *CRC*.

In answer to the second research question, and taking into account the findings in relation to the first, this research has the following objectives:

- (5) To consider why a legal response to the problem of insufficient control by children and young people over their online image is required.
- (6) To establish the justificatory basis for a legal response to the problem of insufficient control by children and young people over their online image.
- (7) To identify and critically evaluate a number of law reform options.

## V FRAMEWORK AND RESEARCH METHOD

The overarching framework of the research is reform-oriented. Reform-oriented research has been described as research 'which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting.'<sup>171</sup> This framework is appropriate given that this thesis advances as its central proposition that the Australian Government should do more, in terms of direct regulation, to give children greater control over the publication of images of themselves online. The perspective adopted in this research is rights-based: specifically it adopts the perspective of children's rights. In adopting this perspective the research is theoretical in the sense that it seeks to argue children's rights as a conceptual basis of the proposed reforms.<sup>172</sup>

An evaluation of the adequacy of existing rules necessitates a description and analysis of those existing rules. To this extent, and to meet the second research objective in particular, the research adopts a traditional doctrinal approach involving the 'systematic exposition of legal doctrine'<sup>173</sup> based upon analysis and critical evaluation of both primary and secondary legal sources. The doctrinal method is also utilised in providing an analysis and interpretation of certain provisions of the *CRC*.

This thesis also presents a number of hypothetical case studies, detailed in Chapter Four. These have been designed to provide a context-focused application of the law, thereby drawing out some of the complexities of and illustrating some of the gaps in the current

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<sup>171</sup> Submission of Australian Law Deans (April 1986) to the CTEC Assessment Committee for the Discipline of Law published in Dennis Pearce, Enid Campbell and Don Harding, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission' (AGPS, Canberra, 1987) vol 2, 9.15.

<sup>172</sup> Theoretical research has been defined as 'research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity': Ibid.

<sup>173</sup> Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson, 2007), 34.

legal and regulatory framework around publication of images or their subsequent use, particularly in the online environment. The studies are either built around images of children and young people that are publically available on the internet, or based upon real-life occurrences reported through the media. Thus, although they are hypothetical, the case studies are based on reality and therefore intended to be realistic examples of the kinds of uses to which images of children and young people could be and have been put. Chapter Four explains in more detail the purpose of using these case studies and the function such use serves, as well as the case study design.

Any reform-oriented research is predicated upon identification of the reason or reasons that existing rules are found wanting. This thesis suggests that the existing rules are wanting because they do not provide children with sufficient control over the online publication of their image, nor its subsequent use; an insufficiency that gives rise to a risk of developmental harm. In developing that argument, this thesis undertakes a critical analysis of non-legal sources in the broad fields of child development and social psychology. Many of the sources reviewed here are written from a constructivist sociological perspective, which is further explained in Chapter Two. However, in selecting and analysing those sources, this thesis deliberately avoids adopting any single discipline or perspective. Rather, the research draws upon and extrapolates from a range of findings relevant to the developmental implications of the use of images within computer mediated communication and social interaction. This objective approach is designed to draw upon the insights of these other disciplines in order to better identify the problem and inform the solution.

The goal of reform-oriented research is to propose reforms where existing rules are found wanting. In fulfilling that goal, the broader social, environmental, economic and political context cannot be overlooked. While this research certainly does not aim to describe, understand or even take into account all of these factors, it recognises that the prevailing context at the time of researching is one that takes a cautious approach to law reform per se, as a policy option.<sup>174</sup> At the time of writing, all policymakers in Australia are required to consider the regulatory impact of their policies by preparing a Research Impact Statement ('RIS') in respect of every policy proposal submitted at a federal level that is designed to introduce or abolish regulation.<sup>175</sup> The Australian Government's Guide to Regulation sets out seven RIS Questions that policymakers much address, namely:

1. What is the problem you are trying to solve?
2. Why is government action needed?
3. What policy options are you considering?
4. What is the likely net benefit of each option?
5. Who will you consult about these options and how will you consult them?

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<sup>174</sup> Australian Government, 'The Australian Government Guide to Regulation' (2014) 4.

<sup>175</sup> Ibid.



6. What is the best option from those you have considered?
7. How will you implement and evaluate your chosen option?<sup>176</sup>

The research in this thesis is broadly organised around the first four of these questions and also aims to make tentative conclusions as to question six ('What is the best option?') and to highlight some considerations around means of implementation (question seven). In so doing, the research aims to align itself with policy research. Policy research has been described as research that is 'focused on helping policymakers to solve social problems' by providing useful recommendations after having submitted to scrutiny all possible actions for resolving the problem.<sup>177</sup> Policy research is, essentially, pragmatic.<sup>178</sup> In the context of this thesis, while this research is reform-oriented, the need for a legal response through law reform (government action) is not accepted as a given but is, instead, explained and justified. With these RIS Questions in mind, the early chapters of this thesis seek to identify the problem. The thesis then moves on to consider why government action is needed and finally to set out and evaluate a number of policy options. A more detailed outline of this thesis is set out in the following section.

## VI THESIS OUTLINE

### A *Chapter Division*

A brief summary of the main issues considered in each chapter follows. The chapters are grouped under headings to show how they relate to the first four and penultimate RIS Questions identified above.

#### 1 *What is the Problem You are Trying to Solve?*

##### *Chapter Two*

Chapter Two addresses research objective (1) by critically evaluating research relating to the risks to child development posed by the unwanted use or publication of images of children, particularly where images are published online. In particular, this chapter considers the potential impact of the unwanted online publication of an image of a child, or its subsequent use, upon the image subject's self-esteem, their relationships and their sense of 'relatedness' (connection to others).

##### *Chapter Three*

Chapter Three reviews the current legal and regulatory environment in Australia relating to the online publication of images of children. The chapter also considers the extent to which the reporting mechanisms of internet content hosts and the co-regulation of the

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<sup>176</sup> Ibid 5.

<sup>177</sup> Ann Majchrzak, *Methods for Policy Research* (Sage, 1984) 13.

<sup>178</sup> Terry C Hutchison, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32 *Melbourne University Law Review* 1065, 1084.

internet in Australia provide for the removal of images of a child at the behest of the image subject, or in response to a request on their behalf. This chapter addresses research objectives (2)(a) and (b) and objective (3)(a).

#### *Chapter Four*

Building on the previous chapter, Chapter Four presents a number of hypothetical case studies relating to the online publication of images of children, or the subsequent use of such images. In doing so it aims to better illustrate the extent to which the legal and regulatory framework discussed in Chapter Three will govern the publication of images in specific situations. The use of hypothetical cases is designed, among other things, to assist in drawing distinctions between 'law-in-the-books' and 'law-in-action'.<sup>179</sup> This chapter addresses research objectives (2)(a) and (b) and to a lesser extent (c), as well as research objective (3)(a).

### *2 Why is Government Action Needed?*

#### *Chapter Five*

Chapter Five begins by noting that there are significant gaps in Australian law, identified in the preceding two chapters, in terms of providing individuals with control over the capture and use of their image by others. For children and young people these gaps are significant given the potential impact on development, outlined in Chapter Two, as a result of the unwanted online posting of images, or their subsequent use. This chapter considers whether a legal response is required to address the issue of the unwanted posting of images online or their subsequent use and, if so, what might be a justificatory basis for that response. The former question is approached by considering Lessig's four 'modalities' that regulate cyberspace: law, norms, the market and the architecture of the internet. In so doing, it addresses research objective (3)(b). The chapter then moves on to consider Australia's commitment to the *CRC* and certain rights under it, arguing that the *CRC* requires Australia to do more to give children control over the unauthorised online publication of their image. In this respect, the chapter addresses research objective (4). Taken as a whole, this chapter addresses research objectives (5) and (6).

### *3 What Policy Options are you Considering, What is the Likely Benefit of Each and Which is the Best Among Those Considered?*

#### *Chapter Six*

Working from the proposition established in Chapter Five that Australia should do more to give children greater control over the unauthorised online publication of their image, Chapter Six presents various policy options that could be considered in order to address the problem that insufficiency of control leaves children vulnerable to developmental

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<sup>179</sup> W Michale Reisman, Siegfried Wiessner and Andre R Willard, 'The New Haven School: A Brief Introduction' (2007) 32(587) *The Yale Journal of International Law* 587, 589.

harm. The key benefit of each option — namely the extent to which it is likely to be effective in solving the problem with which this thesis is concerned — is assessed in order to conclude that only one of the options, a take-down scheme in relation to images of children, is likely to be at all effective. That option is then evaluated in more detail, taking into account both costs and benefits (as described in that chapter). This chapter addresses research objectives (2)(c) and (7).

Having addressed the RIS Questions noted above this thesis will end with a concluding chapter.

### *Chapter Seven*

This chapter provides a brief summary of and description of the key findings from the research and offers a number of recommendations, before finishing with a concluding statement.

## VII SIGNIFICANCE OF RESEARCH AND ORIGINAL CONTRIBUTION TO KNOWLEDGE

The unauthorised use of image is an issue of public concern,<sup>180</sup> one which has attracted government attention<sup>181</sup> and one in respect of which there are acknowledged gaps in Australian law.<sup>182</sup> The ALRC has recommended the development of social protocols in relation to the capture and use of image<sup>183</sup> but, as noted by Howard Becker in relation to a discussion on the ethics of image use, ‘a system without sanctions fails to deter precisely those who most need deterring’<sup>184</sup> This research is significant in that it addresses the difficult question of how Australian law might develop a system that gives children greater control over the use of their image, in an environment that presents particular issues around jurisdiction and enforcement. Although this research will focus primarily on online images of children, and their subsequent use, and will adopt a children’s rights perspective, many of the findings will be likely to have broader application. Some or all of the reforms proposed may be applicable to all members of the community and, in some cases, may apply to images published in an offline context.

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<sup>180</sup> ALRC, *For Your Information*, above n 4, vol 3, 2326–7 [69.106]–[69.109], and see 2224–5 [67.11 and 67.12]. See also ‘Calls Made to Raise Facebook Age Limit’, *Lawyers Weekly* (online), 21 July 2011 <[http://lawyersweekly.com.au/blogs/top\\_stories/archive/2011/07/21](http://lawyersweekly.com.au/blogs/top_stories/archive/2011/07/21)>, noting the concern expressed by some parents that images being uploaded by their children to Facebook may be prejudicial to their future career prospects.

<sup>181</sup> See generally ALRC, *For Your Information*, above n 4; SCAG above n 7; NSWLRC above n 21; VLRC above n 21; VLRC, *Surveillance in Public Places*, Report No 18 (2010). In relation to New Zealand see, generally, Law Commission (New Zealand), above n 111. In relation to the United Kingdom, see ‘MoD Facebook Generation Warning’, *BBC News* (online), 25 June 2008, <[http://news.bbc.co.uk/2/hi/uk\\_news/politics/7473818.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/7473818.stm)>.

<sup>182</sup> ALRC, *For Your Information*, above n 4, vol 1, 453 [11.1].

<sup>183</sup> *Ibid*, vol 3, 2334 [69.135].

<sup>184</sup> Howard S Becker, ‘Foreword: Images, Ethics, and Organizations’ in Larry Gross, John Stuart Katz and Jay Ruby (eds), *Image Ethics in the Digital Age*, (University of Minnesota Press, 2003) xi, xvi.

Further, it is submitted that the question of control of an image in a non-commercial context will become increasingly significant as technology continues to progress and to affect individuals in ways as yet unimagined.<sup>185</sup> As noted in a recent Issues Paper released by the Australian Government, '[c]ommunity concern about the right to and protection of privacy is growing as new technologies change the way we interact with business, government, and each other.'<sup>186</sup> A focus on the right to development under the *CRC* is significant in the context of the concerns expressed by non-governmental organisations that the lack of comprehensive *CRC* protections in Australian domestic law has resulted in laws and policies relating to children being developed in the absence of a rights-based framework.<sup>187</sup>

In Australia most academic discourse on and legal or policy consideration of the subject of image use primarily occurs within two contexts. Firstly, it is considered in the context of celebrity image or commercial exploitation of image and whether or not Australia should introduce a property style right of image.<sup>188</sup> Secondly, discussions around the non-commercial unauthorised use of images tend to be conflated with and thus limited by broader discussions on privacy.<sup>189</sup> The ALRC and SCAG have both touched briefly on the question of whether subjects in photographs or video footage should have rights to an image in a non-commercial context that would not require the subject to establish, as a threshold requirement, a reasonable expectation of privacy.<sup>190</sup> However, neither institution explores these questions in depth. This research will therefore make an original contribution to knowledge by considering the subject of image use in Australia from outside of the privacy or property discourse.

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<sup>185</sup> Yves Poullet and J Marc Dinant, 'The Internet and Private Life in Europe' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions of Privacy Law* (Cambridge University Press) 60, 64. See also Acquisti, Gross and Stutzman, above n 133.

<sup>186</sup> Commonwealth of Australia, Department of the Prime Minister and Cabinet, 'A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy', Issues Paper (September 2011).

<sup>187</sup> Child Rights Taskforce, 'Listen to Children: 2011 Child Rights NGO Report Australia' (2011).

<sup>188</sup> For example, in considering whether their proposed statutory cause of action for serious invasion of privacy should incorporate use of a person's image or likeness without consent ('appropriation'), the ALRC referred with approval to the joint judgment of Gummow and Hayne JJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42] ('*Lenah*'): '[w]hilst objection possibly may be taken on non-commercial grounds to the appropriation of the plaintiff's name or likeness, the plaintiff's complaint is likely to be that the defendant has taken the steps complained of for a commercial gain'. Accordingly, the ALRC suggests that it may be more appropriate to regulate appropriation of image in a *commercial context* by introducing a right of publicity or by extending the passing off action, see ALRC, *For Your Information*, above n 4, vol 3, 2566 [74.122]. Academic papers discussing the property nature of image rights in Australia include Zapparoni, above n 100.

<sup>189</sup> See, eg, SCAG, above n 7, 7 [21], where it is noted that '[c]entral to the issue of unauthorised photographs on the Internet is the balance between privacy expectations on one hand, and freedom of expression on the other.'

<sup>190</sup> See, eg, *Ibid*, 28 [128], which concludes that, by analogy to certain provisions in Dutch copyright law, the central idea of a person's reasonable interests in respect of an image could be protected in Australia in a form outside of copyright law.

This research will also make an original contribution to knowledge by focusing specifically on the effect on children and child development of the unwanted online posting of images, or their subsequent use, and linking that research back to the right to development in the *CRC*. There is a growing body of literature as to the effect of cyberbullying on a child's development and, as noted above, the unwanted online posting of images of children, or the unwanted use of online images, can constitute cyberbullying in certain circumstances. However, as noted in Chapter Two, studies on cyberbullying do not typically distinguish between the effects on an individual image subject of the bullying *behaviour*, on the one hand, and the effects that are attributable to the continued online availability or accessibility to others of a particular image of that child, on the other. This is significant because while laws that seek to address behaviour — such as laws relating to harassment, or the sharing of indecent or offensive images — might provide for removal of an image, many such laws cannot be invoked at the behest of the image subject. Moreover, private law remedies for harm often fail altogether to provide for the removal of an image or where they do so will in practice be of little utility due to issues of cost, complexity and the length of time needed to achieve a resolution.

There is a general lack of research on the specific developmental implications relating to the unwanted online publication of an image of a child, and this is true whether or not the image in question can be described as 'offensive', 'harmful' or 'benign'. This research does not attempt to fill the gap in empirical findings relating to the potential developmental implications of the online publication of images of children and young people. However, it does attempt to present an initial and original perspective on the potential developmental harm attendant upon the unwanted online publication of images of children and young people. It does this by drawing together some of the strands arising from the extant literature and findings in relation to self-presentation (visual and non-visual) and the developmental implications of computer mediated communication.

This thesis also makes an original contribution to knowledge by constructing a number of hypothetical case studies and by evaluating some law reform options recently proposed by the Australian Government and the ALRC, as well as advancing and evaluating another reform option against particular criteria. Central to this evaluative exercise is a consideration of the extent to which those reforms present a balanced, workable and practical solution to the problem with which this thesis is concerned: namely that children have insufficient control over the online publication of images of themselves, which leaves them vulnerable to developmental harm.

## VIII CHAPTER SUMMARY

This chapter has set out the purpose of this thesis, and its central proposition. The overarching purpose of this thesis is to examine the issue of the publication and use of images (photographs and video) when, from the perspective of an image subject who is a

child or a young person, that publication or use is unwanted. The issue is considered in the context of a number of concerns that have been raised about problematic image sharing practices on the internet. These concerns have been raised by young people themselves and by the media, as well as by concerned parents, interest groups, law reform commissions and government inquiries. The central proposition of this thesis is that the Australian Government should do more, in terms of direct regulation, to give children greater control over the publication and use of images of themselves online.

The chapter has set out a number of research questions and specific objectives related to the overarching issues, which are designed to inform and support the central proposition. The chapter has also explained why the scope of the research is limited to images of children and young people that are published online.

The following chapters seek to demonstrate why the unwanted online publication of images of children and young people, or the unwanted use of online images, is problematic. Later chapters will highlight the need for government action and will offer some suggestions for law reforms that can, at least in part, address the problem. The following chapter seeks to illustrate why the unwanted publication of images online is problematic by providing a critical evaluation of research relating to the effect of such use or publication on child development.



## **CHAPTER TWO –THE IMPACT OF IMAGES ON CHILD DEVELOPMENT**

### **I INTRODUCTION AND CHAPTER OUTLINE**

This chapter describes some of the potentially detrimental effects on a child's development of the unwanted online publication or use of an online image of that child. The focus of the discussion is on two fundamental aspects of a child's social and emotional development, namely self-esteem and the development of relationships. This chapter partly addresses the first research question of this thesis: Why do children need greater control over their images in the online environment than they currently enjoy under Australian law?

Part Two of this chapter identifies and discusses the significance of some of the gaps in the research on images and harm. It also advances two propositions. The first is that an image subject can be harmed by the online publication of an image or its use even where the publication or use is not ill-intentioned. The second is that detriment can occur regardless of whether or not the image can be described, objectively, as harmful. These propositions are relevant because the regulation of online publication and sharing of images is generally dependent on identifying unlawful (and, therefore, often intentional) behaviour, or upon identifying material that can be described, objectively, as 'harmful'. If the propositions are supported, this, in turn, supports a central argument of this thesis: that young people should have more control than they currently have over how they are represented on the internet

Part Three then sets out the framework and research method adopted in the remainder of the chapter. Parts Four and Five contain the substantive discussion of the potential developmental implications for an individual of the unwanted online publication of an image of that individual, or its subsequent use. Part Four focuses on an individual's self-concept and the importance of and influences upon self-esteem in a developmental context. It discusses the phenomenon of impression management and how control by an image subject over visual images of themselves is central both to managing impressions and to an individual's sense of autonomy and relatedness. Part Five discusses the role of relationships in development and the impact on an individual's relationships of the decisions others make to publish images of that individual. Part Six of the chapter considers whether, despite the risks of developmental harm outlined in Parts Four and Five, the online posting or sharing of an image might in fact have positive developmental implications for an image subject who is a child. The final part of this chapter summarises the discussion, seeks to show how the preceding discussion supports the two propositions advanced in Part Two, and draws some initial conclusions.



## II IMAGES AND HARM: GAPS IN THE LITERATURE

The publication or sharing of an image of another has been recognised as a form of harassment or victimisation, which, in some circumstances, might also amount to bullying.<sup>1</sup> Although there is no universally accepted definition of bullying,<sup>2</sup> it is commonly agreed that there are four constituent elements, namely intention, aggression, power-imbalance and repetition.<sup>3</sup> Harassment, or victimisation, is usually considered to possess the same elements as bullying, absent the element of repetition.<sup>4</sup> The definitional elements of bullying and harassment are squarely focused on the *behaviour* of an individual perpetrator (the bully) rather than upon the *impact* of behaviour on the victim.<sup>5</sup> Literature on bullying and harassment involving the use of images variously describes the

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<sup>1</sup> Amanda Lenhart, referring to work by Nancy Willard, distinguishes — in the online context - between harassment and bullying on the basis that the latter involves repetition and a power imbalance between victim and perpetrator: Amanda Lenhart, 'Cyberbullying: What the Research is Telling Us' (Speech delivered at the Youth Online Safety Working Group, Washington DC, 6 May 2010). Cf Peter K Smith, Cristina del Barrio and Robert S Tokunaga, 'Definitions of Bullying and Cyberbullying' in Sherri Bauman, Donna Cross and Jenny Walker (eds) *Principles of Cyberbullying Research: Definitions, Measures, and Methodology* (Taylor and Francis, 2012) 26, 30, who observe that not all forms of bullying involve harassment but that all harassment is bullying. Nevertheless, this suggests that the criterion of repetition (discussed below) is not a prerequisite of finding bullying.

<sup>2</sup> Smith, del Barrio and Tokunaga, above n 1. See also Colette Langos, *Cyberbullying, Associated Harm and the Criminal Law* (PhD Thesis, University of South Australia, 2013) 19.

<sup>3</sup> Julian J Dooley, Jacek Pyżalski and Donna Cross, 'Cyberbullying versus Face-to-Face Bullying: A Theoretical and Conceptual Review' (2009) 217(4) *Journal of Psychology* 182, 182. Others note three definitional elements to bullying, conflating aggression and intention: see, eg, the papers referred to in Robin M Kowalski et al, 'Bullying in the Digital Age: A Critical Review and Meta-Analysis of Cyberbullying Research among Youth' (2014) 140 (4) *Psychological Bulletin* 1073, 1109. For further discussion on the definition of bullying see Donna Mathewson Mitchell and Tracey Borg, 'Examining the Lived Experience of Bullying: A Review of the Literature from an Australian Perspective' (2013) 31(2) *Pastoral Care in Education: An International Journal of Personal, Social and Emotional Development* 142, 145–6. In the context of cyberbullying (as to the definition of which see Robin M Kowalski et al, at 1073; Langos, above n 2): there have been discussions as to whether all elements, particularly that of repetition, are applicable. Menesini et al note that the literature has not yet established if repetition has to be a criterion for the definition: Ersilia Menesini, Annalaura Nocentini and Pamela Calussi, 'The Measurement of Cyberbullying: Dimensional Structure and Relative Item Severity and Discrimination' (2011) 14(5) *Cyberpsychology, Behaviour and Social Networking* 267, 269. See, also, Dooley, Pyżalski and Cross at 182–3, noting that '[a] single aggressive act such as uploading an embarrassing picture to the Internet can result in continued and widespread humiliation for the victim. Whereas the aggressive act is not repeated the damage caused by the act is relived through ongoing humiliation.' See also Robert Slonje and Peter Smith, 'Cyberbullying: Another Main Type of Bullying?' 2008 (49) *Scandinavian Journal of Psychology* 149, 154.

<sup>4</sup> Lenhart, above n 1.

<sup>5</sup> Although Vandebosch and Van Cleemput argue that to be considered 'true' cyberbullying the bully's actions must not only be intended to hurt, but must be perceived by the target as hurtful: Heidi Vandebosch and Katrien Van Cleemput, 'Defining Cyberbullying: A Qualitative Research into the Perceptions of Youngsters' (2008) 11(4) *Cyber Psychology & Behaviour* 499, 499.

nature of those images as ‘embarrassing’,<sup>6</sup> ‘humiliating’,<sup>7</sup> ‘hurtful’,<sup>8</sup> ‘harmful’<sup>9</sup> and so on.<sup>10</sup> What exactly it is that makes an image embarrassing, humiliating, hurtful, harmful and so forth, and from whose perspective this is judged, is not made clear. It is, however, implicit in the discussion or use of the descriptive terms referred to that there is something about what is portrayed, something objectively discernible, that makes the image embarrassing, humiliating, hurtful, harmful and so on. There are also references in the literature to incidents of bullying that take the form of images accompanied by text. Kowalski et al refer to one example of a girl who created a social media page about other girls in her class whom she perceived to be promiscuous. Pictures of these classmates, to which the girl added derogatory comments, were posted by the girl to her social media page.<sup>11</sup> Another example is given by Hinduja and Patchin who tell of a Facebook profile page where the user behind the page juxtaposed images of people and animals and compared their features.<sup>12</sup> In cases such as this, the image itself might be ‘benign’ or ‘anodyne’; it is the addition of the text that transforms the image into a vehicle for the perpetrator’s aggression and ill-intent.<sup>13</sup>

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<sup>6</sup> CCSO Cybercrime Working Group, ‘Cyberbullying and the Non-consensual Distribution of Intimate Images’ (Report to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety, Canada, 2013), 4; Slonje and Smith, above n 3, 153; Megan Price and John Dalgleish, ‘Cyberbullying: Experiences, Impacts and Coping Strategies as Described by Australian Young People’ (2010) 29(2) *Youth Studies Australia* 51, 55; Sherri Gordon, ‘8 Ways Kids are Using Instagram to Bully’ on About Health, About.Com (4 June, 2014) <<http://bullying.about.com/od/Cyberbullying/fl/8-Ways-Kids-Are-Using-Instagram-to-Bully.htm>>.

<sup>7</sup> Langos, above n 2; JSCCS, Parliament of Australia, *High Wire Act: Cyber-Safety and the Young*, Interim report (June 2011), 70.

<sup>8</sup> Slonje and Smith, above n 3, 153.

<sup>9</sup> Tass Sakellariou, Annemarie Carroll and Stephen Houghton, ‘Rates of Cyber Victimization and Bullying among Male Australian Primary and High School Students’ (2012) 33 *School Psychology International* 533, 539; Christine D MacDonald and Bridget Roberts-Pittman, ‘Cyberbullying among College Students: Prevalence and Demographic Differences’ (2010) 9 *Procedia Social and Behavioural Sciences* 2003, 2003.

<sup>10</sup> Images have also been described in literature on bullying as ‘sexual’ (Langos, above n 2, 56) defines a sexual image as one which depicts the subject engaging in a sexual act); JSCCS, above n 7, 137 [4.52]: refers to the practice of sexting whereby individuals send nude or semi-nude images to one another, which images are sometimes later distributed to a wider and unintended audience); ‘intimate’ (Langos, at 56) defines an intimate image as one that depicts the subject’s genital or anal area, or using the toilet). See generally CCSO Cybercrime Working Group, above n 6; ‘defamatory’ (Price and Dalgleish, above n 6, 51); ‘degrading’ (Langos, at 38); ‘derogatory’ (Langos, at 59): Langos classes derogatory images of an identifiable subject as a form of denigration. Although she does not define what makes an image ‘derogatory’, she gives as an example the manipulation of a photograph such that the image subject’s bottom appears bigger than it actually is: Langos, at 59; ‘rude’ (Dorothy W Grigg, ‘Definitional Constructs of Cyber-bullying and Cyber-aggression from a Triangulatory Overview: A Preliminary Study into Elements of Cyber-bullying’ (2012) 4(4) *Journal of Aggression, Conflict and Peace Research* 202, 206) and ‘private’ (Qing Li, ‘Cyberbullying in High Schools: A Study of Students’ Behaviours and Beliefs about this New Phenomenon’ (2010) 19 *Journal of Aggression, Maltreatment & Trauma* 372, 374).

<sup>11</sup> Robin M Kowalski, Susan P Limber and Patricia W Agatston, *Cyberbullying: Bullying in the Digital Age* (Blackwell Publishing, 2<sup>nd</sup> ed, 2012) 13.

<sup>12</sup> Sameer Hinduja and Justin W Patchin, *Bullying beyond the Schoolyard: Preventing and Responding to Cyberbullying* (Corwin, 2<sup>nd</sup> ed, 2009) 57.

<sup>13</sup> See, also, Michael Zhang, ‘Teen Arrested for Bullying Others Using Hurtful Instagram Photos’ on PetaPixel (1 February 2013) <<http://petapixel.com/2013/02/01/teen-arrested-for-bullying-others-using-hurtful-instagram-photos/>>: a US teen has been arrested for bullying others using hurtful Instagram photos. It is

The Australian Government's cyber-safety report has referred to the 'public humiliation' that may be experienced by victims of bullying 'seeing images of themselves posted on an online platform'.<sup>14</sup> Nevertheless, literature on bullying and victimisation devotes surprisingly little attention to examining the differential impact upon victims of the various forms of bullying or victimisation, including that which takes the form of the distribution and sharing of images.<sup>15</sup> In 2014 Kowalski et al published a critical review and meta-analysis of cyberbullying research among youth. Their analysis encompassed a vast array of international literature on the topic, reviewing over 250 books, academic papers and other resources on cyberbullying. None of those resources had as their primary focus the impact of bullying or victimisation occurring by way of the publication or distribution of images of the victim.<sup>16</sup> However, a few of those papers did specifically consider the impact upon victims of different forms of bullying, including, in some instances, bullying involving the publication and distribution of images of another.<sup>17</sup> Slonje and Smith found

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unclear what the photographs actually depicted (and whether they could be described as inherently embarrassing or humiliating and so forth) but certainly the captions added to the photographs were hurtful (an example given in the article is the addition of the caption 'drunken fool' to one photograph). The teen was, it is reported, charged with harassment.

<sup>14</sup> JSCCS, above n 7, 98 [3.97].

<sup>15</sup> A factor recognised by Vera Slavtcheva-Petkova et al who note that '[i]n terms of identifying what types of harm are associated with cyber-bullying, only around a quarter of the articles explicitly operationalize the concept of harm. The remainder either define cyber-bullying as involving harm or assume cyber-bullying equals harm. A clear picture of the negative impacts associated with the different contexts or manifestations of cyber-bullying is therefore difficult to form': Vera Slavtcheva-Petkova, Victoria Jane Nash and Monica Bulger, 'Evidence on the Extent of Harms Experienced by Children as a Result of Online Risks: Implications for Policy and Research' (2015) 18(1) *Information, Communication & Society* 48, 55–6.

<sup>16</sup> Kowalski et al, above n 3.

<sup>17</sup> Ibid. The sources referred to in Kowalski et al included approximately 90 that had (as their primary focus) the measurement or prevalence of cyberbullying; victims' experiences of cyberbullying; drivers or modalities of bullying; the difference between cyberbullying and traditional bullying and the impact on victims of bullying. Of those papers, a number specifically recognised that bullying could occur by way of the distribution or publication of images of the victim. However, only those papers specifically mentioned in this section considered the impact of images as a specific modality of cyberbullying. Although Kowalski et al reviewed literature on cyberbullying, it is apparent that a number of those studies involving surveys of victims of bullying did not confine their results to those experiencing bullying, as opposed to victimisation or other 'harmful' behaviour. For example, a number of surveys that aimed to establish the prevalence of bullying in general, or the prevalence or impact of particular types of bullying, provided operational definitions of cyberbullying that did not necessarily contain all or even any of the four definitional elements accepted by most academics (and referred to above). Thus, for example, in a survey carried out by MacDonald and Roberts-Pittman on the prevalence and demographics of cyberbullying among college students, the definition of cyberbullying provided to participants was 'sending or posting harmful or cruel text or images using the Internet or other digital communication devices': MacDonald and Roberts-Pittman, above n 9. None of the definitional elements (intention, aggression, power-imbalance or repetition) are included in the above definition. See also Qing Li, above n 10. As such, it may be that several reports of the prevalence of image sharing as a form of cyberbullying actually reflect the subjective experiences of image subjects (their own view that images were embarrassing, humiliating, hurtful, and so on) rather than an experience that would be objectively defined as bullying or victimisation. As has been noted by Staude-Müller et al, 'many very stressful incidents can be found in which these [cyberbullying] criteria are either not met or cannot be ascertained': Frithjof Staude-Müller, Britta Hansen and Melanie Voss, 'How Stressful is Online Victimization? Effects of Victim's Personality and Properties of the Incident' (2012) 9(2) *European Journal of Developmental Psychology* 260, 261.

that the publication and distribution of photographs or video clips was one of the most impactful forms of bullying.<sup>18</sup> These findings were later corroborated by research undertaken by Menesini et al, who found that picture or video clip bullying had the highest impact factor for both males and females.<sup>19</sup> Dooley et al suggested that the uploading of an embarrassing image to the internet might result in 'continued and widespread ridicule' for the victim and 'significant and long-lasting social emotional harm'.<sup>20</sup> Other researchers have found that the misuse of picture or video material, along with threats of concrete injury and the revelation of secrets, was more stressful for teenage victims than other forms of victimisation, such as receiving insults or sexual harassment.<sup>21</sup>

Slonje and Smith report three reasons given by participants in their bullying study for rating the impact of pictures and videos so highly. The first reason given is the large audience size when a picture or video is placed online; the second is the concreteness effect, the effect of actually *seeing* the photograph or video;<sup>22</sup> and the third is the fear of not knowing who had seen the picture or video in question.<sup>23</sup> Menesini et al likewise suggest that one of the reasons for pictures and videos rating highly in terms of severity is the 'public nature of the acts showing the victim in some intimate, embarrassing, or hurtful situations.'<sup>24</sup> Dooley et al posit that it is the permanence of images online that contributes to the impact on the victim of bullying conducted through pictures or images,<sup>25</sup> while Staude-Müller et al suggest that the posting of photographs or videos online entails the crossing of a boundary between virtual space and real space, which can be particularly stressful for the victim.<sup>26</sup> Research conducted by Brighi et al found that students who reported having experienced 'reputational attacks' via videos on YouTube (among other things) scored lower in terms of self-esteem and loneliness compared to victims who did not experience a reputational attack.<sup>27</sup> What is notable about all of these observations is that they relate to the impact on the victim of the publication or

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<sup>18</sup> Peter K Smith et al 'An Investigation into Cyberbullying, its Forms, Awareness and Impact, and the Relationship between Age and Gender in Cyberbullying' (Research Brief No RBX03-06, University of London, July 2006).

<sup>19</sup> Menesini, Nocentini and Calussi, above n 3, 268. But, cf Allison Schenk's findings that there were no statistically significant differences in the impact on a cyberbullying victim by virtue of the form the bullying took, whether through the internet, picture/video messaging or masquerading: Allison Schenk, *Impact of Cyberbully Victimization among College Students* (Masters' Thesis, Morgantown, West Virginia, 2011) 40.

<sup>20</sup> Dooley, Pyżalski and Cross, above n 3, 183.

<sup>21</sup> Frithjof Staude-Müller, Thomas Bliesener and Nicole Nowak Cyberbullying und Opfererfahrungen von Kindern und Jugendlichen im Web 2.0 [Cyberbullying and Children and Adolescents' Victimization Experiences in Web 2.0] (2009) 54 *Kinder- und Jugendschutz in Wissenschaft und Praxis* 42–7 cited in Staude-Müller, Hansen and Voss, above n 17, 262.

<sup>22</sup> Slonje and Smith, above n 3, 153.

<sup>23</sup> Ibid.

<sup>24</sup> Menesini, Nocentini and Calussi, above n 3, 272.

<sup>25</sup> Dooley, Pyżalski and Cross, above n 3, 183.

<sup>26</sup> Staude-Müller, Hansen and Voss, above n 17, 262.

<sup>27</sup> Antonella Brighi et al, 'Self-Esteem and Loneliness in Relation to Cyberbullying in Three European Countries' in Qing Li, Donna Cross and Peter K Smith (eds) *Cyberbullying in the Global Playground: Research from International Perspectives* (Blackwell Publishing, 2012) 32, 49–50.

distribution of the image in question, rather than to the impact on the victim of the *behaviour* giving rise to the publication or distribution. This is significant because it suggests that the negative impact on an image subject of the online publication and distribution of images can arise even where that publication or distribution does not constitute bullying or victimisation.<sup>28</sup> As such, it seems reasonable to suggest that the negative implications of the online posting and distribution of images of another can occur even absent any deviant or ill-intended behaviour at all. That is, it is the nature of the image, the forum of publication, the potential audience and the fact that images are such an impactful form of communication (as discussed in Chapter One) that are key in terms of how the posting and distribution of an image affects the image subject.

There is a significant body of literature concerning the developmental implications of bullying and cyberbullying more generally. For example, Patchin and Hinduja's study of Middle School students in the United States found that students who experienced cyberbullying (whether as a victim or perpetrator) had significantly lower self-esteem than those who had little or no experience of cyberbullying.<sup>29</sup> Cyberbullying has also been linked to increased tobacco, alcohol and drug use, as well as to a number of negative effects on both mental and physical health, and to other detrimental outcomes.<sup>30</sup> However, research on bullying generally does not delve into any developmental implications for victims of specific forms of bullying, including bullying that takes the form

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<sup>28</sup> So, for example, while intention is an element of all definitions of bullying and victimisation, it is certainly true to say that embarrassing or humiliating pictures can be posted online without any intention on the part of the person uploading the photographs to harm the image subject. This is reflected in the following comment made by a respondent to the JSCCS: 'Cyber-bullying just depends on how people take it ... Sometimes it goes too far and some people don't think of it as being taken too far as some other people tend to take it as just joking. How do you know when one takes it as a joke and someone else thinks it's an attack ...? Cyber-bullying doesn't seem like it's that simple of a problem to resolve. (Female aged 17)': JSCCS, above n 7, 62. Similar sentiments were expressed by participants in the Committee's High School Forum: 'Sometimes it is hard to know what was intended seriously and what was intended as a joke or as a friendly sort of jest, because you do not get the expressions and the tone of voice. Sometimes things can be taken in the wrong manner as to how they are intended. (Sally)': JSCCS, at 62.

<sup>29</sup> Justin W Patchin and Sameer Hinduja, 'Cyberbullying and Self-Esteem' (2010) 80(12) *Journal of School Health* 614, 619. See also Robert Didden et al, 'Cyberbullying among Students with Intellectual and Developmental Disability in Special Education Settings' (2009) 12(3) *Developmental Neurorehabilitation* 146, 149–50 reporting a link between online victimization and low self-esteem and between bullying and depressive feelings.

<sup>30</sup> See, eg, Kowalski et al, above n 3, 1114–15. This chapter does not aim to repeat those findings in any detail particularly because in relation to images as a means to bully such findings, as already noted, do not typically focus specifically on the developmental implications of that practice. Nevertheless, a good recent overview of extant literature on the impact of cyberbullying (among other things) is contained in Kowalski et al. See also Slavtcheva-Petkova, Nash and Bulger, above n 1515, 55–7 (discussing harms relating to cyberbullying). For a recent review on the impact of online technology and social media in general on adolescent health and wellbeing see Paul Best, Roger Manktelow and Brian Taylor, 'Online Communication, Social Media and Adolescent Wellbeing: A Systematic Narrative Review' (2014) 14 *Children and Youth Services Review* 27; see also Lauren A Spies Shapiro and Gayla Margolin, 'Growing Up Wired: Social Networking Sites and Adolescent Psychosocial Development' (2014) 17(1) *Clinical Child and Family Psychology Review* 1; Megan A Wood, William M Bukowski and Eris Lis, 'The Digital Self: How Social Media Serves as a Setting that Shapes Youth's Emotional Experiences' (2016) 1(2) *Adolescent Research Review* 163.

of the publication or distribution of images of the victim. Even outside of the context of studies on bullying or victimisation, there is a dearth of literature considering the developmental implications for an image subject of the online existence or distribution of images, where that is unwanted.<sup>31</sup> The paucity of research in this area is somewhat surprising given that there has been fairly extensive research on the issue of *self-presentation* in the online context (that is, presentation of oneself *by* oneself, rather than presentation of a person by another).<sup>32</sup>

The gaps in research as to the impact on an image subject of the online publication and use of images are significant. This is not least because, as will be discussed in more detail in Chapter Three, the regulation of images in the online environment generally depends upon identifying unlawful *behaviour* (whether that is cyberbullying, harassment, stalking, the creation and distribution of offensive material or child pornography and so on) rather than harmful material. Legislation recently enacted by the federal government does seek to provide children with a means to secure the removal of online content, including images, which amounts to cyberbullying material targeting an Australian child.<sup>33</sup> Here the emphasis is more upon the nature of the material rather than the behaviour giving rise to it. However, as will become apparent throughout this thesis, even this legislation does not provide a remedy for an image subject merely because of the effect upon that subject of the image being available online, or subsequently used in a particular way.<sup>34</sup> Accordingly, an understanding of the potential developmental implications of the online publication

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<sup>31</sup> Besmer and Lipford refer to this lack of research: Andrew Besmer and Heather Richter Lipford, 'Moving Beyond Untagging: Photo Privacy in a Tagged World' (2010) *Chi '10: Proceedings of the SIGCHI Conference on Human Factors in Computing Systems* 1563, 1564; likewise Smock who suggests that this issue warrants further study: Andrew Smock, 'Self-Presentation on Facebook: Managing Content Created by the User and Others' (Paper presented at the Annual Meeting of the International Communication Association, Singapore, 22–26 June 2010) 1, 3. Litt et al refer to their research on information presented about individuals by others as 'foundational' and note that there are many more questions to be answered: Eden Litt et al, 'Awkward Encounters of an "Other" Kind: Collective Self-Presentation and Face Threat on Facebook' (2014) *CSCW '14 Proceedings of the 17<sup>th</sup> ACM Conference on Computer Supported Cooperative Work and Social Computing* 449, 459.

<sup>32</sup> Albeit that even in this context research on the visual aspects of self-presentation (presentation of self through the medium of photos and images) is fairly limited. The literature on self-presentation is discussed in Parts Four and Five of this chapter.

<sup>33</sup> *Enhancing Online Safety for Children Act 2015* (Cth).

<sup>34</sup> Although there may be scope for the Children's e-Safety Commissioner to consider the effects of material on a particular child. The Office of the Children's e-Safety Commissioner provides the following explanation as to how the Commissioner decides if something is serious cyberbullying material. 'We take a flexible approach so that children who are genuinely affected by cyberbullying material are protected. This involves considering both the individual child and the material itself. When we consider a child we look at the child's background and particular circumstances, any vulnerabilities of the child and the relationship between the child and the person posting the material. When considering the material, we look at things like the language used, the impact of any audio or visual material, the sensitivity of the material, the number of potential views and how often the material was posted. To be pursued, material must be more than merely offensive or insulting': Office of the Children's e-Safety Commissioner, *How Does the Commissioner Decide if Something Is Serious Cyberbullying Material?*, Cyberbullying Complaints FAQs <<https://www.esafety.gov.au/complaints-and-reporting/cyberbullying-complaints/cyberbullying-complaints-faqs>>.

and use of images of children and young people can assist in determining whether the current regulatory framework around images of children in the online environment — detailed in Chapter Three — is sufficient to protect children from the risk of developmental harm. Moreover, it has been recognised at a governmental level that further research on the ‘impact of the “social media lifestyle” on children and how to address any negative consequences’ is necessary.<sup>35</sup>

An exploration of the potential developmental harms relating to the visual representation of children by others in the online environment is also important in order to bring a different perspective to some of the concerns that have been raised in relation to the issue of the unwanted posting of images. These concerns, noted in Chapter One, are sometimes presented as entailing privacy interests; yet there are real difficulties in conceptualising privacy and, more to the point, in determining which interests should properly be regarded as privacy interests. As Hughes has observed ‘[a] rounded understanding of privacy cannot be found in a purely legal or philosophical “definition”: it is necessary to draw upon the insights of other disciplines, and a core weakness in much privacy scholarship has been the failure to do so.’<sup>36</sup> That is not to say that the unwanted online publication of images or their subsequent use should necessarily be understood as a privacy issue — only that a broader understanding of the developmental implications of such publication and use might serve to better illuminate the interests at stake.<sup>37</sup> Moreover, as is discussed further in Chapter Five, under the *CRC*, children not only have a right to privacy but also have a right to development.<sup>38</sup> Understanding when optimal development may be compromised, therefore, is a prerequisite to Australia being able to fulfil its obligations to children under the *CRC*.

### III FRAMEWORK AND RESEARCH SCOPE

This chapter suggests a number of implications for child development of the online posting and sharing of images of children. Therefore, it is necessary to begin by considering how development is understood within child development theory. Child development theory holds that development is multi-faceted. Development is typically divided into three broad domains — physical development, cognitive development, and social and emotional development.<sup>39</sup> However, it is important to remember that although development occurs across different domains, development does not occur within any domain in isolation.<sup>40</sup> Thus, development within any given domain can impact on

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<sup>35</sup> ‘Liberal-National Coalition, *The Coalition’s Discussion Paper on Enhancing Online Safety for Children*, November 2012, 11.

<sup>36</sup> Kirsty Hughes, ‘A Behavioural Understanding of Privacy and its Implications for Privacy Law’ (2012) 75(5) *The Modern Law Review* 806, 806.

<sup>37</sup> See, further, the discussion in Chapter Five, Part B, The Convention on the Rights of the Child (Right to Privacy).

<sup>38</sup> *CRC* art 6(2).

<sup>39</sup> Laura E Berk, *Infants, Children, and Adolescents* (Allyn and Bacon, 4<sup>th</sup> ed, 2002) 5–6.

<sup>40</sup> Sandra Smidt, *The Developing Child in the 21<sup>st</sup> Century* (Routledge, 2006) 2–3.

development in any other domain. For example, cognitive development can impact upon social and emotional development and so on. Indeed, as Affolter writes, it has been relatively recently acknowledged that emotional wellbeing has an important influence on physical health, cognitive performance and pro-social competence and that, in turn, emotional wellbeing is implicated in the creation of socio-politically stable societies and nations.<sup>41</sup>

While recognising that development occurs across and between various domains, the main focus of this chapter is on the domain of social and emotional development. Specifically, this chapter focuses on particular aspects of social and emotional development: namely the development of self-concept and self-esteem, and the development of relationships. These aspects of development have been selected because they are frequent themes in child development literature around which a discussion of social and emotional development issues are organised, at least from middle childhood onwards.<sup>42</sup> Moreover, these aspects of development are also implicated in what have been described as the main developmental goals to be achieved by the end of adolescence: identity formation, autonomy, intimacy and the development of the sexual self.<sup>43</sup> However, it is acknowledged that these aspects of development are only 'part of the picture' and cannot present a holistic perspective on development even within a single domain.<sup>44</sup>

A number of commentators emphasise that development must be viewed in a historical and cultural context.<sup>45</sup> For the purposes of this chapter, however, the basic question as to whether optimal child development is threatened by the unwanted publication of images of children, specifically in the online environment, is considered within the Australian context as it exists at the time of writing. That is not to say, of course, that the Australian

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<sup>41</sup> Friedrich W Affolter, 'Socio-Emotional Enablement and the Convention on the Rights of the Child' (2015) 13 *The International Journal of Children's Rights* 379, 379.

<sup>42</sup> See, eg, Berk, above n 39, Chapters 13 and 16.

<sup>43</sup> These four goals of development are referred to by Jochen Peter and Patti M Valkenberg, 'Adolescent's Online Privacy: Towards a Developmental Perspective' in Sabine Trepte and Leonard Reinecke (eds), *Privacy Online: Perspectives on Privacy and Self-Disclosure in the Social Web* (Springer, 2011) 221, 224 (citing Butako and Steinberg: references omitted). See also Kaveri Subrahmanyam and Patricia Greenfield, 'Online Communication and Adolescent Relationships' (2008) 18(1) *The Future of Children* 119, 124 drawing on John Hill's claim that adolescent behaviour is best understood in terms of the four key developmental tasks of adolescence (identity, autonomy, intimacy and sexuality).

<sup>44</sup> Given the vast literature on even any one aspect of development within any single domain, and taking into account the myriad different perspectives offered to any given aspect of development (perspectives within child development include the psychodynamic perspective, the behavioural perspective, the cognitive perspective, the contextual perspective and the evolutionary perspective — see, eg, Robert S. Feldman, *Child Development* (Pearson, 5<sup>th</sup> ed, 2009) 8–30; Berk, above n 39, 15–32), a holistic account is far beyond the scope of this thesis.

<sup>45</sup> See, eg, Martin Woodhead, 'Early Childhood Development: a Question of Rights' (2005) 37 (3) *International Journal of Early Childhood* 79; Smidt, above n 40, 6–10.



context represents a unitary or even a unified cultural perspective, nor that within that context there is any accepted belief about what constitutes optimal development.

For many young people in Australia the internet is an increasingly important, integrated and integral part of their daily lives<sup>46</sup> and research has established that the internet in general, and social media in particular, can affect views of the self and the body.<sup>47</sup> Accordingly, researchers have become increasingly interested in the developmental implications of computer-mediated communication and the way in which impressions are managed in the online environment. Marwick notes that in relation to the development of identity in the context of online media and communication, most work has focused on impression management.<sup>48</sup> Impression management refers to the means or processes by which individuals seek to control the impressions that others form of them.<sup>49</sup> As noted by Leary and Kowalski, 'the impressions people make on others have implications for how others perceive, evaluate and treat them, as well as for their own view of themselves.'<sup>50</sup> Accordingly, impression management is implicated in the development of self and identity, and has implications for a person's self-concept and self-esteem, as well as the way in which a person relates to others and, in turn, the development and quality of relationships.<sup>51</sup> Impression management is influenced by self-presentation, which has been described as a vital skill that must be learned and practised during childhood and, in particular, adolescence.<sup>52</sup> The internet clearly provides numerous opportunities for individuals to engage in self-presentation and impression management,<sup>53</sup> including through the medium of images (whether of themselves or others), as well as opportunities for social interaction. Not surprisingly, therefore, there is a growing body of literature devoted to exploring the ways young people present themselves online, including through image selection. What is surprising, however, is the relative dearth of literature focusing

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<sup>46</sup> JSCCS, above n 7, 10–11. See also Australian Communications and Media Authority, *Excessive Internet Use* (22 October 2014) Staying Safe Online <<http://www.acma.gov.au/Citizen/Stay-protected/My-online-world/Staying-safe-online/excessive-internet-use>>.

<sup>47</sup> Dian A de Vries, *Social Media and Online Self-presentation: Effects on How we See Ourselves and Our Bodies' on Social Network Sites* (PhD Thesis, University of Amsterdam, 2014) 126.

<sup>48</sup> Alice Marwick, 'Online Identity' in John Hartley, Jean Burgess and Axel Bruns (eds) *Companion to New Media Dynamics* (John Wiley & Sons, 2013).

<sup>49</sup> Mark R Leary and Robin M Kowalski, 'Impression Management: A Literature Review and Two-Component Model' (1990) 107(1) *Psychological Bulletin* 34, 34.

<sup>50</sup> Ibid. See also Alexander Peter Schoten, *Adolescents' Online Self-Disclosure and Self-Presentation* (PhD Thesis, University of Amsterdam, 2007) 107 noting that self-disclosure and self-presentation are two important processes in adolescent social development.

<sup>51</sup> Patti M Valkenburg and Jochen Peter, 'Online Communication among Adolescents: An Integrated Model of its Attraction, Opportunities and Risks' (2011) 48 *Journal of Adolescent Health* 121, 122.

<sup>52</sup> Ibid.

<sup>53</sup> Amy L Gonzales and Jeffrey T Hancock, 'Mirror, Mirror on My Facebook Wall: Effects of Exposure to Facebook on Self-Esteem' (2011) 14(1–2) *Cyberpsychology, Behaviour and Social Networking* 79, 80; Susannah Stern, 'Producing Sites, Exploring Identities: Youth Online Authorship' in David Buckingham (ed) *Youth, Identity, and Digital Media* (MIT Press, 2008) 95 (generally); Soraya Mehdizadeh, 'Self-Presentation 2.0: Narcissism and Self-Esteem on Facebook' (2010) 13(4) *Cyberpsychology, Behaviour and Social Networking* 357, 357.

on implications for an individual of the online posting of images of themselves by *others*, or the subsequent use of such images. Accordingly, this chapter seeks to present an initial perspective on the potential developmental harms attendant upon the online publication of images of children and young people. It does so by extrapolating from the extant literature and findings in relation to impression management and self-presentation (visual and non-visual) and some of the developmental implications of computer mediated communication.

Given that the main focus of this chapter is on the domain of emotional and social development, the chapter predominately examines literature from the broad field of social psychology, and focuses specifically on literature relating to impression management. Social psychology has been defined as ‘the scientific investigation of how the thoughts, feelings, and behaviours of individuals are influenced by the actual, imagined or implied presence of others.’<sup>54</sup> By studying behaviour, social psychologists seek to gain an insight into underlying psychological, cognitive and even neuro-chemical processes that drive behaviour.<sup>55</sup> A vast range of different topics fall within the sphere of social psychology, amongst which is the topic of impression management,<sup>56</sup> often referred to synonymously as self-presentation,<sup>57</sup> and usually approached from the symbolic interactionist perspective of social psychology.<sup>58</sup>

In order to focus on the social-psychological perspectives of the posting and sharing of images online, this chapter deliberately avoids delving into the vast philosophical literature that explores some of the same issues discussed here. Nevertheless, it should be noted that the philosophical literature often touches upon issues of development and the correlation between information sharing, privacy and relationships.<sup>59</sup>

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<sup>54</sup> Michael A Hogg and Graham M Vaughan, *Social Psychology* (Prentice Hall, 6<sup>th</sup> ed, 2011) 4 citing G W Allport (reference omitted).

<sup>55</sup> Ibid 4.

<sup>56</sup> Ibid 5.

<sup>57</sup> Leary and Kowalski, above n 49.

<sup>58</sup> Symbolic interactionism is a theoretical perspective which embodies a constructionist epistemology (Michael Crotty, *The Foundations of Social Research* (Allen & Unwin, 1998) 5). Constructionism, in turn, holds that meaning is not an objective truth awaiting discovery but is constructed. Accordingly, the meaning ascribed to even a singular phenomenon may vary depending on who it is experiencing or interpreting the phenomenon in question (Crotty, at 9). Blumer sets out three assumptions on which the symbolic interactionist perspective is based: namely that ‘human beings act towards things on the basis of the meanings that these things have for them’; ‘that the meaning of such things is derived from, and arises out of, the social interaction that one has with one’s fellow’; and ‘that these meanings are handled in, and modified through, an interpretive process used by the person in dealing with the things he encounters’ (Herbert Blumer, *Symbolic Interactionism: Perspective and Method* (Prentice-Hall, 1969) 2).

<sup>59</sup> Detailed reviews and analysis of that literature can be found elsewhere: see, eg, Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford Law Books, 2010) esp Chapter 4 (Locating the Value in Privacy). Nissenbaum herself seeks to explain many of the issues arising from the presentation of individuals by others in the online environment through her theory of contextual integrity, which is discussed later in Chapter Five.

Much of the research referred to in this chapter does not relate specifically to children or young people. A number of developmental implications arising from the unwanted publication of online images, or their subsequent use, can occur regardless of whether the image subject is a child or an adult. Nevertheless, that research can be related back to a child development context by noting the special significance of these developmental implications for children and young people, given that childhood and adolescence is a crucial time for the achievement of important developmental goals (as explained further below). Moreover, while impression management is implicated in the ways people present themselves and thus in the development of self-identity, impression management is only one aspect of the process of forming that self-identity — broader issues and processes relating to the formation of self-identity go beyond the scope of this chapter.

The developmental risks discussed in this chapter are not always limited to situations where an image is published or shared without the consent of or against the wishes of the image subject. Indeed, these implications are not always confined to situations in which others have published the image: they can arise, for example, as an unintended consequence of an image being available or shared online by the image subject themselves. As such, this chapter intentionally refers to the ‘unwanted’ online publication of an image or the ‘unwanted’ sharing of an online image. The word ‘unwanted’ includes but is not limited to situations where the publication of the image on the internet has been made without the consent of or against the wishes of the image subject. It also includes but is not limited to situations in which the image subject originally published the image online (for example, by uploading it to their own social media site) but does not support the way in which it has been subsequently used, or subsequently regrets the decision to post it online and wishes to withdraw it from publication.

This chapter does not aim to fill any of the gaps in the empirical research relating the developmental implications for children of the unwanted online publication and sharing of images of children. However, it extrapolates from the extant literature and findings in relation to impression management and self-presentation (visual and non-visual) and some of the developmental implications of computer mediated communication to argue in support of the two propositions advanced at the beginning of the chapter. To reiterate, the first proposition is that the non-consensual or unwanted online publication or distribution of an image of a child can have a detrimental impact on that child’s development, even where the posting or sharing of the image is not ill-intentioned. The second proposition is that detriment can occur regardless of whether or not the image can be described, objectively, as harmful.

#### IV SELF-CONCEPT AND SELF-ESTEEM

This part of the chapter begins by considering the meaning and importance of self-esteem in child development and some of the factors that influence self-esteem. Following on

from that, the relationship between autonomy and self-esteem is explained. It is noted here that an individual's self-esteem may be affected by the extent to which they are able to control the presentation of self and regulate interpersonal boundaries.

### A *The Meaning and Importance of Self-Esteem*

In developmental literature the development of self-concept and self-esteem is often considered key to the construction of 'identity'. Identity has, in turn, been described as one of the key developmental goals of adolescence.<sup>60</sup> One's self-concept has been described as the way one perceives oneself, the 'picture' that one has of oneself<sup>61</sup> or the knowledge one has about oneself.<sup>62</sup> The developmental importance of self-concept is captured by Burns in the following summary:

Many contemporary psychologists ... ascribe to the self concept a key role as a factor in the integration of personality, in motivating behaviour and in achieving mental health.<sup>63</sup>

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<sup>60</sup> Erikson H Erikson, *Identity: Youth and Crisis* (Faber & Faber, 1968) 161. See also: Peter and Valkenberg, 'above n 43; Berk, above n 39, 600. Kroger notes at xv that adolescence is a time of transformation in identity although also observes, at 34, that questions have been raised about Erikson's proposed timing of development: Jane Kroger, *Identity in Adolescence* (Taylor and Francis, 2004). Identity itself has been described as both a 'nebulous and contested' concept: Stern, above n 53, 96. See also Nina Huntemann and Michael Morgan, 'Media and Identity Development' in *Handbook of Children and the Media* (Sage Publications, 2<sup>nd</sup> ed, 2012) 305 describing identity as a complex and problematic concept. One of the criticisms of Erikson's theory of identity is, as noted by Jane Kroger, the fact that it employs 'unclear or imprecise formulations of identity': Kroger at 34. The process of identity formation during adolescence is subject to varying theories: see generally Kroger. Erikson believed that adolescents necessarily experienced a period of 'identity crisis' but Burk notes that current theorists do not accept this as a given: Laura E Berk, above n 39, 601. Foddy and Finighan do not agree that a person achieves a 'unified' identity: W H Foddy and W R Finighan, 'The Concept of Privacy from a Symbolic Interaction Perspective' (1980) 10 (1) *Journal for the Theory of Social Behaviour* 1, 4. The exact relationship between self-concept and 'identity' is also not straightforward: some regard identity as a part of self-concept (see, eg, Joel M Charon, *Symbolic Interactionism: An Introduction, an Interpretation, an Integration* (Prentice Hall, 6<sup>th</sup> ed, 1998) 89) whereas others talk more in terms of self-concept as a *facet* of identity (see, eg, Berk, at 600 who explains that identity construction involves 'defining who you are, what you value, and the directions you choose to pursue in life', suggesting that self-definition and value-definition entail self-concept but that directions one chooses to pursue relate to an 'ideal self' or a 'possible self'; others see self-concept and identity as separate albeit related phenomena (see, eg, Foddy and Finighan, above n 60: 'An identity, then, involves an individual's idea of the type of person he *wants to be* in the eyes of others, whereas his sense of self involves his perceptions of *how he is seen* by others. Clearly the two concepts are related but they do not just refer to the same phenomenon.')

<sup>61</sup> See, eg, Charon above n 60, 82. Note, however, that while defining self-concept in this reasonably simplistic way may be fairly widely accepted in psychology literature (see, eg, Berk, above n 39, 367), Burns reminds us that the concept itself is complex and multi-dimensional: R B Burns, *The Self Concept: Theory, Measurement, Development and Behaviour* (Longman, 1979) 28.

<sup>62</sup> Jennifer D Campbell and Loraine F Lavalley, 'Who am I? The role of self-concept confusion in understanding the behaviour of people with low self-esteem' in Roy F Baumeister (ed) *Self-Esteem: The Puzzle of Low Self-Regard* (Plenum, 1993) 3, 4.

<sup>63</sup> Burns, above n 61, 2.

Self-esteem, in turn, is often considered to be the evaluative aspect of self-concept:<sup>64</sup> It has been variously defined as constituting the ‘judgments we make about our own worth and the feelings associated with those judgments’<sup>65</sup> and the ‘level of global regard one has for the self as a person.’<sup>66</sup> In terms of the significance of self-esteem to development (particularly, but not exclusively, within the domain of social and emotional development), a positive correlation has been established between a low level of self-esteem and health problems and mood disturbances,<sup>67</sup> including anxiety and depression.<sup>68</sup> Research has also established a link between low self-esteem and certain negative emotions such as shame, guilt<sup>69</sup> and a tendency to suffer embarrassment.<sup>70</sup> By

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<sup>64</sup> Berk, above n 39, 602. Charon describes the self-esteem (or self-judgement) as part of self-concept: Charon, above n 60, 82; but others have used the term ‘self-concept’ to describe only the knowledge aspects of the self-schema, as distinct from the evaluative component of the self-schema: Campbell and Lavalley, above n 62. One’s self-concept is described by Rosenberg as the ‘totality of the individual’s thoughts *and feelings* with reference to himself [or herself] as an object’: cited in Charon at 89 (emphasis added to signify that Rosenberg appears to regard self-esteem as an aspect of the self-concept). A further distinction can be found in the psychology literature between ‘state self-esteem’ (how an individual feels about themselves at any given moment or with regard to a particular domain (eg academic ability) or with regard to a particular relational context (eg relations with parents)) and ‘trait self-esteem’ (the more generalised, global or ‘baseline’ evaluation of oneself): see, eg, Geoff Macdonald and Mark R Leary, ‘Individual Differences in Self-Esteem: A Review and Theoretical Integration’ in (eds) Mark L Leary and June Price Tangney *Handbook of Self and Identity* (Guilford Publications, 2<sup>nd</sup> ed, 2011) 354, 354. Not all would accept that this is a valid explanation of the construct of self-esteem however: see, eg, Susan Harter and Nancy R Whitesell, ‘Beyond the Debate: Why some Adolescents Report Stable Self-Worth Over Time and Situation, Whereas Others Report Changes in Self-Worth’ (2003) 71(6) *Journal of Personality* 1027, 1032. Note that the terms self-esteem and self-concept are not necessarily used consistently — as Burns has noted ‘in the field of psychology which is generally distinguished by the imprecision of its terminology and by an incapacity to even agree on definitions, self-referent constructs stand foremost in the ranks of this confusion’: Burns, above n 61, 50. Terms such as self-regard, self-judgement and self-worth are sometimes used instead of self-esteem: see, eg, (respectively) MacDonald and Leary, at 355, referring to Fleming and Courtney’s measure of global trait self-esteem ‘(Which they called “general self-regard”)’ [references omitted]; Charon, above n 60, 82; Susan Harter, ‘Causes and Consequences of Low Self-Esteem in Children and Adolescents’ in Roy F Baumeister (Ed) *Self-Esteem: The Puzzle of Low Self-Regard* (Plenum, 1993) 87.

<sup>65</sup> Berk, above n 39, 369.

<sup>66</sup> Harter, above n 64, 88. See also the definitions offered by the following authors: Sarah Tazghini and Karen L Siedlecki, ‘A Mixed Method Approach to Examining Facebook Use and its Relationship to Self-Esteem’ (2013) 29 *Computers in Human Behaviour* 827, 827: ‘Self-esteem refers to the extent to which one prizes, approves, likes or values oneself’; Michael A Stefanone, Derek Lakoff and Devan Rosen, ‘Contingencies of Self-Worth and Social-Networking-Site Behaviour’ (2011) 14(1-2) *Cyberpsychology, Behaviour and Social Networking* 41, 42: ‘Self-esteem refers to one’s appraisal of the value or worth of the self’; Maxine Wolfe, ‘Childhood and Privacy’ in Irwin Altman and Joachim F Wohlwil (eds) *Children and the Environment* (Plenum Press 1978) 175, 218: ‘Self-esteem can be generally defined as the evaluation individuals customarily maintain with regard to themselves.’

<sup>67</sup> Anita DeLongis, Susan Folkman and Richard Lazarus, ‘The Impact of Daily Stress on Health and Mood: Psychological and Social Resources as Mediators’ (1988) 54(3) *Journal of Personality and Social Psychology* 486, 491.

<sup>68</sup> Leonard I Pearlin et al, ‘The Stress Process’ (1981) 22 *Journal of Health and Social Behaviour* 337, 345; MacDonald and Leary, above n 64, 360.

<sup>69</sup> June Price Tangney & Ronda L Dearing, *Shame and Guilt* (Guilford Publications, 2<sup>nd</sup> ed, 2002) 59.

<sup>70</sup> Rowland S Miller, ‘On the Nature of Embarrassability: Shyness, Social Evaluation and Social Skill’ (1995) 63(2) *Journal of Personality* 316, 325 (correlation between social self-esteem and embarrassment); Mark R Leary and Sarah Meadows, ‘Predictors, Elicitors, and Concomitants of Social Blushing’ (1991) 60(2) *Journal of Personality and Social Psychology* 254, 257.

contrast, a positive correlation has been found between high levels of self-esteem and resilience,<sup>71</sup> and between higher levels of self-esteem and overall wellbeing. MacDonald and Leary, referring to some of the numerous studies on self-esteem, observe that

compared with people who score low on measures of trait self-esteem, people who score higher tend to be happier and less depressed, to have more friends, to be more satisfied with their interpersonal relationships, to worry less about being rejected, to conform less, to work harder on difficult tasks, to feel less lonely, are less likely to abuse alcohol, and to be less prone to a variety of psychological problems.<sup>72</sup>

Other researchers have established that self-esteem is significantly related to 'affect' (or 'mood'<sup>73</sup>), especially to depression,<sup>74</sup> and that low self-esteem may even be a risk factor in suicide.<sup>75</sup> In relation to adolescents in particular, low levels of self-esteem have been related to anxiety<sup>76</sup> and 'strongly associated' with substance abuse.<sup>77</sup> Boden et al observe that self-esteem is

often implicated in the development of adolescent behaviour, with high self-esteem serving as a source of resiliency or positive adaptation. Conversely low self-esteem has been implicated in the development of a wide range of maladaptive responses to the issues of adolescence.<sup>78</sup>

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<sup>71</sup> MacDonald and Leary, above n 64, 355; Steven J Spencer, Robert A Josephs and Claude M Steele, 'Low Self-Esteem: the Uphill Struggle for Self-Integrity' in Roy F Baumeister (ed) *Self-Esteem: The Puzzle of Low Self-Regard* (Plenum, 1993) 21, 27.

<sup>72</sup> MacDonald and Leary, above n 64, 355.

<sup>73</sup> Charles Stangor defines affect as the feelings people experience as part of their everyday lives, which feelings are experienced in the form of mood and emotions: Charles Stangor, *Principles of Social Psychology* (University of Maryland, 2011) section 1.2.

<sup>74</sup> Julia Sowislo and Ulrich Orth, 'Does Low Self-Esteem Predict Depression and Anxiety? A Meta-Analysis of Longitudinal Studies' (2013) 139(1) *Psychological Bulletin* 213, 216–17, 224; Harter, above n 64, 89; Andrew G Renouf and Susan Harter, 'Low Self-Worth and Anger as Components of the Depressive Experience in Young Adolescents' (1990) 2(3) *Development and Psychopathology* 293, 301; GW Brown et al, 'Social Support, Self-Esteem and Depression' (1986) 16 *Psychological Medicine* 813. Note, however, that MacDonald and Leary prefer to explain this by reference to the fact that individuals who have low self-esteem are less motivated to deal with negative affect: MacDonald and Leary, above n 64, 361.

<sup>75</sup> Harter, above n 64, 105; Angus H Thompson 'The Suicidal Process and Self-Esteem' (2010) 31(6) *The Journal of Crisis Intervention and Suicide Prevention* 311, 314; Berk, above n 39, 630–1.

<sup>76</sup> Joseph M Boden, David M Fergusson and L John Horwood, 'Does Adolescent Self-Esteem Predict Later Life Outcomes? A Test of the Causal Role of Self-Esteem' (2008) 20 *Development and Psychopathology* 319, 334; Ian Newbegin and Anthony Owens, 'Self-Esteem and Anxiety in Secondary School Achievement' (1996) 11(3) *Journal of Social Behaviour and Personality* 521; Have E Rawson, 'The Interrelationship of Measures of Manifest Anxiety, Self-Esteem, Locus of Control, and Depression in Children with Behaviour Problems' (1992) 10(4) *Journal of Psychoeducational Assessment* 319, 334.

<sup>77</sup> Boden, Fergusson and Horwood, above n 76, 320 citing studies by Wild et al (2004), Unger et al (1997) and Carvajal et al (1998) (references omitted).

<sup>78</sup> Ibid 321 citing studies by Rutter (1987) as to the link between high self-esteem and resilience and Evans et al 1994, Hammen 1992 and Harter 1993 in relation to the link between low self-esteem and maladjustment during adolescence (references omitted).

Further, people with low self-esteem have been found to have a lower sense of relational value — their sense of how valued they are by others — which in turn often leads to negative emotions as well as to a lack of motivation to repair such negative emotions.<sup>79</sup>

Importantly, low self-esteem has also been linked to suicidal ideation and attempted suicide in secondary students.<sup>80</sup> Low self-esteem was identified as a suicide risk factor in the Western Australian Suicide Prevention Strategy 2009–2013.<sup>81</sup> This is particularly significant given that suicide is a leading cause of death among young people in Australia, second only to motor vehicle accidents.<sup>82</sup> In relation to Western Australian teenagers (aged 13 to 17 years) suicide was in fact the leading cause of all deaths notified to the Ombudsman under the office's child death review function.<sup>83</sup>

In summary, self-esteem is widely believed to exert a 'pervasive and powerful impact' on human cognition, behaviour, emotion and motivation<sup>84</sup> and is often described as a psychological resource<sup>85</sup> or as a 'protective factor' against psychological problems<sup>86</sup> and against suicide.<sup>87</sup>

Aside from the fact that self-esteem is implicated in emotional, behavioural, cognitive and even physical development, self-esteem is also implicated in social development. Cooley believed that the self is fundamentally a social construct that is formed by 'casting one's gaze into the social mirror to ascertain the opinions of significant others toward the self.'<sup>88</sup> Mead built upon Cooley's insights to propose that individuals incorporate into judgements about themselves a generalised conception of the extent to which others hold them in regard.<sup>89</sup> Charon has observed that of all propositions derived from the symbolic

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<sup>79</sup> MacDonald and Leary, above n 64, 362.

<sup>80</sup> James C Overholser et al, 'Self-Esteem Deficits and Suicidal Tendencies among Adolescents' (1995) 34 (7) *Journal of the American Academy of Child and Adolescent Development* 919, 924.

<sup>81</sup> Government of Western Australia, Department of Health, *Suicide Prevention Strategy 2009–2013: Everybody's Business*, 28 (Table 3).

<sup>82</sup> Centre for Adolescent Health, The Royal Children's Hospital Melbourne, *Youth Suicide in Australia* <[http://www.rch.org.au/cah/research/Youth\\_Suicide\\_in\\_Australia/#facts](http://www.rch.org.au/cah/research/Youth_Suicide_in_Australia/#facts)>.

<sup>83</sup> Ombudsman Western Australia, *Annual Report 2012–2013* (26 September 2013), 69. The Western Australia suicide prevention strategy 2020 also noted that suicide was the leading preventable cause of death: Government of Western Australia, Mental Health Commission, *Suicide Prevention 2020: Together We Can Save Lives*, 18.

<sup>84</sup> Campbell and Lavalley, above n 62, 3; MacDonald and Leary, above n 64, 354, 355.

<sup>85</sup> DeLongis, Folkman and Lazarus, above n 67.

<sup>86</sup> See generally, eg, Manoj Kumar Rao and Preeti Tamta, 'Self-Concept: A Predictor of Mental Health' 2015 6(2), *Indian Journal of Health and Wellbeing* 148; Michael Mann et al, 'Self-Esteem in a Broad Spectrum Approach for Mental Health Promotion' (2004) 19(4) *Health Education Research* 357.

<sup>87</sup> Amira Y Sharaf, Elaine A Thompson and Elaine Walsh, 'Protective Effects of Self-Esteem and Family Support on Suicide Risk Behaviours among At-Risk Adolescents' (2009) 22(3) *Journal of Child and Adolescent Psychiatric Nursing* 160; the Western Australian Suicide Prevention Strategy 2020 notes that the development of good self-esteem in school-age children is a protective factor against suicide: Government of Western Australia, above n 83, 25.

<sup>88</sup> Susan Harter, above n 64, 89.

<sup>89</sup> George Herbert Mead, *The Philosophy of the Present* (Open Court Publishing, 1932) 190: 'We assume the generalized attitude of the group, in the censor that stands at the door of our imagery and inner

interactionist perspective of social psychology, the proposition that self-esteem (or self-judgement) is related to the judgement of others is 'the most empirically supported' and thus comes closest to a 'simple causal relationship in the traditional ... sense.'<sup>90</sup>

MacDonald and Leary prefer to explain the link between self-esteem and certain emotional, behavioural and cognitive phenomena by reference to sociometer theory.<sup>91</sup> Sociometer theory posits that self-esteem reflects the extent to which a person believes themselves to have relational value — in other words the extent to which one feels valued by important others.<sup>92</sup> According to this theory, negative feelings associated with low self-esteem may provide feedback on the extent to which a person has low relational value, thereby motivating behaviour that will redress this.<sup>93</sup> According to the theory, self-esteem assumes an important role both in gauging one's relational worth as well as in maintaining or improving one's relational value (thus, in how one relates to the outside world). As a corollary of this, however, it has been found that high self-esteem individuals tend to be more socially confident than low self-esteem individuals, with the likelihood that this confidence will, in turn, lead to a wider range of social possibilities and a greater sense of belonging.<sup>94</sup> That individuals with low self-esteem may feel less connected to social networks is concerning because, as Forest and Wood observe, feeling interconnected is a 'fundamental human motivation' and because a strong social support network has been found to be a factor in better mental and physical health.<sup>95</sup>

## B *Influences on Self-Esteem*

### 1 *Perceptions of How Others See Us*

While it can be said that there is a widely accepted causal relationship between a person's self-esteem and the judgement of that person by others, this link is not straightforward. What influences an individual's self-judgement is not only what others think of them but

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conversations, and in the affirmation of the laws and axioms of the universe of discourse. Quod semper, quod ubique. Our thinking is an inner conversation in which we may be taking the roles of specific acquaintances over against ourselves, but usually it is with the "generalized other" that we converse'.

<sup>90</sup> Charon, above n 60, 84.

<sup>91</sup> MacDonald and Leary, above n 64, 356.

<sup>92</sup> Mark R Leary describes relational value as the 'degree to which a person regards his or her relationship with another individual as valuable or important', and goes on to say that '[c]learly the higher a person's relational value in the eyes of other people, the more likely they are to include, support, and protect him or her, so relational value, inclusion and acceptance are closely related': Mark R Leary, 'Sociometer Theory and the Pursuit of Relational Value: Getting to the Root of Self-Esteem' (2005) 16(1) *European Review of Social Psychology* 75, 82.

<sup>93</sup> MacDonald and Leary, above n 64, 356. A number of controlled experiments have reportedly substantiated sociometer theory: see, eg, references in Max Weisbuch et al, 'Self-Esteem Depends on the Beholder: Effects of a Subtle Social Value Cue' (2009) 45(1) *Journal of Experimental Social Psychology* 143, 144.

<sup>94</sup> MacDonald and Leary, above n 64, 362.

<sup>95</sup> Amanda L Forest and Joanne V Wood, 'When Social Networking is Not Working: Individuals with Low Self-Esteem Recognize but Do Not Reap the Benefits of Self-Disclosure on Facebook' (2012) 23 *Psychological Science* 295, 295. See also Peggy A Thotis, 'Mechanisms Linking Social Ties and Support to Physical and Mental Health' (2011) 52(2) *Journal of Health and Social Behaviour* 145, 145.



what that individual *believes* others think of them.<sup>96</sup> Thus, while individuals may be sensitive to even subtle social cues<sup>97</sup> (and low self-esteem individuals may be more reactive to external self-relevant cues<sup>98</sup>) it is possible for individuals to misinterpret social cues. As Charon explains, even when others actually like us, we might interpret their actions towards us as negative (or vice versa).<sup>99</sup> It is our interpretation of what others think that acts upon our self-esteem.

Given that the views of others are taken as a reference point in forming self-perception and that a positive self-judgement has been described as a fundamental human need,<sup>100</sup> it is important for most people to create favourable impressions upon those with whom they interact. Creating a favourable impression upon others is particularly important where those others are considered 'significant'.<sup>101</sup> Research has found that the views of peers are especially important to children and young people, and that peer disapproval and rejection corresponds with a number of negative future emotional and behavioural outcomes.<sup>102</sup> Research also suggests that this concern with the appraisal of others heightens throughout early and middle adolescence: in early adolescence individuals are sensitive to the views of them held by significant others, whereas in middle adolescence

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<sup>96</sup> Harter and Whitesell, above n 64, 1035 referring to Cooley: the perceived opinions of others are 'incorporated into the evaluation of one's worth as a person'; Charon, above n 60, 83; Foddy and Finighan, above n 60 (sense of self involves his perceptions of how he is seen by others). This view is also supported by MacDonald and Leary, above n 64, 360.

<sup>97</sup> Weisbuch et al, above n 93, 147.

<sup>98</sup> Campbell and Lavalley, above n 62, 10.

<sup>99</sup> Charon, above n 60, 84. Charon goes on to say, however, that it is also possible for individuals to simply refuse to accept the way in which others see them, as well as to influence (or seek to influence) the way in which others see them.

<sup>100</sup> Nicole C Krämer and Stephan Winter, 'Impression Management 2.0: The Relationship of Self-Esteem, Extraversion, Self-Efficacy, and Self-Presentation Within Social Networking Sites' (2008) 20(3) *Journal of Media Psychology* 106, 107 citing Barry R Schlenker, *Impression Management: The Self-Concept, Social Identity and Interpersonal Relations* (1980 Brooks/Cole) 88; Barry R Schlenker 'Identity and Self-Identification' in Barry R Schlenker (ed) *The Self and Social Life* (McGraw-Hill, 1985); Claude M Steele 'The Psychology of Self-affirmation: Sustaining the Integrity of the Self' in (1988) 21 *Advances in Experimental Social Psychology* 261. Laura Smart Richman and Mark Leary make the 'assumption that the psychological core of all instances in which people receive negative reactions from other people is that they represent, to varying degrees, threats to the goal of being valued and accepted by other people': Laura Smart Richman and Mark R Leary, 'Reactions to Discrimination, Stigmatization, Ostracism, and Other Forms of Interpersonal Rejection: A Multimotive Model' (2009) 116(2) *Psychological Review* 365, 365.

<sup>101</sup> As Harter and Whitesell explain: 'Cooley postulated that significant others constituted social mirrors into which the child gazes in order to detect the opinions of others toward the self. These perceived opinions, in turn, are incorporated into the evaluation of one's worth as a person': Harter and Whitesell, above n 64, 1035. See also Foddy and Finighan, above n 60 (sense of self involves his perceptions of how he is seen by others); Charon, above n 60, 84.

<sup>102</sup> See, generally, Richman and Leary, above n 100; Janis B Kupersmidt, Margaret Burchinal & Charlotte J Patterson, 'Developmental Patterns of Childhood Peer Relations as Predictors of Externalizing Behaviour Problems' (1995) 7 *Development and Psychopathology* 825, 825: 'Results show that both group and dyadic peer relations problems are risk factors for aggression and delinquency'. See also Mitchell J Prinstein and Julie Wargo Aikins, 'Cognitive Moderators of the Longitudinal Association between Peer Rejection and Adolescents' Depressive Symptoms' (2005) 32 (2) *Journal of Abnormal Child Psychology* 147, 147: substantial increases in the prevalence of girls' depression due to peer rejection.

they are 'morbidly preoccupied' with what others think.<sup>103</sup> The adolescent preoccupation with what others think is accompanied by conscious decisions about the way in which the self is presented. Livingstone and Brake's research describes teenagers' fascination with the presentation of self:

At the heart of the explosion in online communication is the desire to construct a valued representation of oneself which affirms and is affirmed by one's peers. Observation of teenagers' social networking practices reveals the pleasure they find in creating an online 'project of the self'.<sup>104</sup>

Reinforcing this view, a number of researchers have found that the internet provides new opportunities and tools for individuals to engage in self-presentation and impression management.<sup>105</sup> Users of social networking sites have been found to 'invest great effort into managing an online identity that represents them in the best possible way'<sup>106</sup> and there is considerable support for Stern's assertion that the internet presents an opportunity for individuals to 'put their best face forward' and present 'touched up', although not necessarily unrealistic, self-presentations.<sup>107</sup>

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<sup>103</sup> Susan Harter, 'Developmental Differences in Self-Representations During Childhood', in William Damon, Richard M Lerner and Nancy Eisenberg (eds) *Handbook of Child Psychology, Social, Emotional, and Personality Development* (Vol 3, John Wiley & Sons, 6<sup>th</sup> ed, 2006) 505, 541. See also Stern, above n 53, 97: 'During adolescence in particular individuals typically begin to question and deconstruct how they think of their selves. This self-inquiry is not conducted in isolation, but rather in the context of, and through feedback from, meaningful others. As Erikson put it "The process of identity formation depends on the interplay of what young persons at the end of childhood have come to mean to themselves and what they now appear to mean to those who become significant to them."' It has been suggested that adolescence is, in particular, a time when individuals are engaged in defining their identity: see, eg, Stern, at 96-97), and that the self-concept is highly vulnerable or changeable during this time: see H Ybrandt, 'The Relation between Self-Concept and Social Functioning in Adolescence' (2008) 31 *Journal of Adolescence* 1, 5; Catherine Sebastian, Stephanie Burnett and Sarah-Jayne Blakemore, 'Development of the Self-Concept during Adolescence' (2008) 12(11) *Trends in Cognitive Science* 441, 441.

<sup>104</sup> Sonia Livingstone and David Brake, 'On the Rapid Rise of Social Networking Sites: New Findings and Policy Implications' 2009 24(1) *Children and Society* 75, 79, citing Giddins (reference omitted).

<sup>105</sup> Gonzales and Hancock, above n 53, 79–80; Stern, above n 53, 97-98; Mehdizadeh, above n 53, 358.

<sup>106</sup> Sanja Kapidzic, 'Narcissism as a Predictor of Motivations Behind Facebook Profile Picture Selection' (2013) 16(1) *Cyberpsychology, Behaviour, and Social Networking* 14, 14. See also Mehdizadeh, above n 53, 358: 'studies suggest that the most important motive for hosting a personal homepage is impression management and self-expression' (citing Krämer & Winter, above n 100).

<sup>107</sup> See, generally, Liam Bullingham and Ana C Vasconcelos, 'The Presentation of Self in the Online World: Goffman and the Study of Online Identities' (2013) 39(1) *Journal of Information Science* 101; Kristie Holmes, 'Of Course I Don't Post Too Much' (2013) *SAGE Open* 1, 6; Brittany Gentile et al, 'The Effect of Social Networking Websites on Positive Self-Views: An Experimental investigation' (2012) 28(5) *Computers in Human Behaviour* 1929, 1929 ('self-presentations tend to be selective, and carefully managed but not false'); Seoyeon Hong et al, 'The Real You? The Role of Visual Cues and Comment Congruence in Perceptions of Social Attractiveness from Facebook Profiles' (2012) 15(7) *Cyberpsychology, Behaviour and Social Networking* 339, 340 ('sometimes profile owners display idealized characteristics that do not reflect their actual personalities'); Barry R Schlenker, 'Self-Presentation' in Mark R Leary and June Price Tangney (eds) *Handbook of Self and Identity* (Guilford Publications, 2<sup>nd</sup> ed, 2011) 542, 542 referring to numerous research papers on self-presentation that support the fact that self-presentations can involve attempts to convey an 'accurate' portrait of oneself and need not be deceptive or manipulative; Smock, above n 31, 5; Stern, above n 53, 106 (young authors generally 'view their public selves not as fabrications, but as "touched up" versions

Self-presentation in the online environment can take a number of forms including, though of course not limited to, the way one presents one's visual aspect or visual image.<sup>108</sup> A number of studies demonstrate that young people consciously select for online display images of themselves in which they perceive themselves to look good, or which present or affirm a particular desired-for impression.<sup>109</sup> Researchers have also found that gender and personality type affects both the number of self-images uploaded onto social networking sites, as well as the type of images uploaded,<sup>110</sup> and that young people use photographs to express things that are important to them.<sup>111</sup> More generally, visual cues provided by an individual themselves, as well as those provided by others, have been found to play a significant role in the process of creating impressions of that individual in the online environment.<sup>112</sup>

## 2 *Self-Esteem and Appearance*

An individual's appearance has been found to have significance for the way in which others respond to that individual. Schlenker writes that attractive individuals are judged

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of themselves'). Moreover, certain types of Facebook user may be more likely than others to do things (such as untagging unflattering photographs) to make themselves look more popular: Robert E Wilson, Samuel D Gosling, Lindsay T Graham, 'A Review of Facebook Research in the Social Sciences' (2012) 7(3) *Perspectives on Psychological Science* 203, 210; Schoten, above n 50, 108.

<sup>108</sup> See generally Minsun Shim, Min Ju Lee and Sang Hee Park 'Photograph Use on Social Network Sites among South Korean College Students: the Role of Public and Private Self-Consciousness' (2008) 11(4) *Cyberpsychology & Behaviour: The Impact of the Internet, Multimedia and Virtual Reality on Behaviour and Society* 489. See also Mehdizadeh, above n 53, 358.

<sup>109</sup> Kapidzic, above n 106; Hong et al, above n 107, 340; Hui-Tzu Grace Chou and Nicholas Edge, "'They Are Happier and Having Better Lives than I am": The Impact of Using Facebook on Perceptions of Others' Lives' (2012) 15(2) *Cyberpsychology, Behaviour and Social Networking* 117, 117; Andra Siibak, 'Constructing the Self through the Photo Selection – Visual Impression Management on Social Networking Websites' (2009) 3(1) *Cyberpsychology: Journal of Psychosocial Research on Cyberspace* (article 1) (generally - referring to various studies that support this finding); Mehdizadeh, above n 53, 358; Bernie Hogan, 'The Presentation of Self in the Age of Social Media: Distinguishing Performances and Exhibitions Online' (2010) 30(6) *Bulletin of Science, Technology, and Society* 377, 379.

<sup>110</sup> Jian Raymond Rui and Michael A Stefanone, 'Strategic Image Management Online', (2013) 16(8) *Information, Communication and Society* 1286, 1301 ('Female participants shared more photos and updated wall posts more frequently than males in our sample. This finding supports previous evidence demonstrating that females tend to share more personal information online and this gender difference was most pronounced in the context of shared digital photos'); and narcissists have been found to be more likely to post main (profile) images of themselves that promoted their attractiveness and were generally self-promoting : Lauren E Buffardl and W Keith Campbell, 'Narcissism and Social Networking Sites' (2008) 34 *Personality and Social Psychology Bulletin* 1303, 1310. See also Smock, above n 31, 24–25: researchers have found that personality characteristics not only influence the type of information presented, but the extent to which individuals monitor and manage the information presented about them.

<sup>111</sup> Henna Mikkola, Merja-Maaria Oinas and Kari Kumpulainen, 'Net-Based Identity and Body Image among Young IRC Gallery Users' in Karen McFerrin et al (eds), *SITE 2008 – Society for Information Technology and Teacher Education Conference (Association for the Advancement of Computing in Education (AACE, 2008)* 3080, 3085.

<sup>112</sup> Christina Jaschinski and Piet Kommers, 'Does Beauty Matter? The Role of Friends' Attractiveness and Gender on Social Attractiveness Ratings of Individuals on Facebook' (2012) 8(3) *International Journal of Web Based Communities* 389, 399.

differently and treated differently by others, have more social power and feel better about themselves.<sup>113</sup> Citing a number of studies, Schlenker goes on to say that:

More attractive people find that audiences care more about their feelings, are more persuaded by their words, model their behaviours, follow their leads, and conform more to their presumed wishes.<sup>114</sup>

Nevertheless, the extent to which an individual's self-esteem is tied in with their appearance (or their perception of how they appear to others) seems to depend on a number of factors. Mikkola et al assert that adolescents live in a culture in which physical appearance plays a 'significant role',<sup>115</sup> and Harter has found that self-evaluation of appearance is 'inextricably linked' to overall self-esteem.<sup>116</sup> However, a number of studies have found that certain individuals more than others stake their self-esteem on their appearance or, at least, on others' evaluations of how they look.<sup>117</sup> Further, while Siibak found that both boys and girls believed that looks were an important factor in popularity,<sup>118</sup> a number of studies have found that females tend to be more dissatisfied with their bodies than males<sup>119</sup> and may be concerned about their appearance, or more likely to tie their self-worth to it.<sup>120</sup> These findings have also been borne out in an

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<sup>113</sup> Schlenker, above n 100.

<sup>114</sup> Ibid 271. More recently a meta-analysis conducted Langlois et al confirmed that, among other things, attractive children and adults are judged and treated more positively than those who are less attractive: see generally, Judith H Langlois et al, 'Maxims or Myths of Beauty? A Meta-Analytic and Theoretical Review' (2000) 126 (3) *Psychological Bulletin* 390; see also Masako Kikuchi, *Appearance Stereotypes and Social Value Orientation: Perception and Behaviour in a Mixed Motive Situation* (PhD Thesis, Brandeis University, 2008) 15.

<sup>115</sup> Mikkola, Oinas and Kumpulainen, above n 111, 3081. See also Joel R Grossbard et al, 'Body Image Concerns and Contingent Self-Esteem in Male and Female College Students' (2009) 60 *Sex Roles* 198, 198: 'Body image is a significant developmental concern for adolescents and young adults'.

<sup>116</sup> Harter, above n 64, 95.

<sup>117</sup> Stefanone, Lakoff and Rosen, above n 66, 46: 'younger participants reported being more focused on appearance and competition'; Older girls showed significantly lower body satisfaction and this 'partially accounted for the lower levels of global self-esteem among older participants'); Grossbard et al, above n 115, 205; Daniel Clay, Vivian L Vignoles, and Helga Dittmar, 'Body Image and Self-Esteem Among Adolescent Girls: Testing the Influence of Sociocultural Factors' (2005) 15(4) *Journal of Research on Adolescence* 451, 470. Beverley K Mendelson and Donna R White, 'Development of Self-Body-Esteem in Overweight Youngsters' (1985) 21 (1) *Developmental Psychology* 90, 95 found that in the age-range 11.5–14.4 years being overweight adversely affected the self-esteem of males, while in the age range 14.5–17.4 years, being overweight adversely affected the self-esteem of females.

<sup>118</sup> Siibak, above n 109: 'The analyses of the youngsters' answers suggest 79% of the boys and 85% of girls believe that a person foremost has to be good-looking in order to become popular among one's virtual network').

<sup>119</sup> Mikkola, Oinas and Kumpulainen, above n 111, 3081 (although noting, also, that body image has become an essential part of young boys' identity construction).

<sup>120</sup> Rui and Stefanone, above n 110, ('woman tend to be more concerned about their appearance and exhibit greater motivation to protect their physical images'); Jessica Rose et al, 'Face It: The Impact of Gender on Social Media Images' (2012) 60(5) *Communication Quarterly* 588, 603 (research supports the fact that females aim to conform to stereotypical expectations of attractiveness in the way impressions are managed on Facebook); Joel R Grossbard et al, above n 115, 205. See also (generally) Sarah E Lowery et al, 'Body Image, Self-Esteem, and Health-Related Behaviors Among Male and Female First Year College Students' (2005) 46(6) *Journal of College Student Development* 612; Susan Harter, above n 64, 96–97.

Australian context. Western Australia's Children's Commissioner reports on a national study of young people aged 15-19 years, which found that body image was one of the top three concerns raised by all young people, regardless of gender, but that young females had higher levels than males of extreme concern in relation to body image.<sup>121</sup>

Given that an individual's self-esteem may be affected by the feedback received from others,<sup>122</sup> positive feedback in response to images of a particular individual (photographs or videos) can be expected to boost that individual's self-esteem, whereas negative feedback can be expected to have a detrimental impact on the subject's sense of self-worth.<sup>123</sup> This is indeed borne out in the findings of a number of studies.<sup>124</sup> Nevertheless, given that an individual's sense of self-worth may be shaped not by what others actually think of them but what they believe others think of them, it is not necessary for feedback to be received at all in order for an individual's self-esteem to be impacted. This idea is best expressed by Cooley's description of the 'looking glass self':

As we see our face, figure and dress in the glass, and are interested in them because they are ours, and pleased or otherwise with them according as they do or do not answer to what we should like them to be, so in imagination we perceive in another's mind some thought of our appearance, manners, aims, deeds, character, friends and so on, and are variously affected by it.

A self-idea of this sort seems to have three principal elements: the imagination of our appearance to the other person: the imagination of his judgment of that appearance; and some sort of self-feeling, such as pride or mortification.<sup>125</sup>

Self-evaluation of appearance and the 'inherent' need to create a favourable impression may therefore explain why some individuals consciously select for online display (for example, on their social media profile pages) photographs of themselves in which they

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<sup>121</sup> Commissioner for Children and Young People Western Australia, *The State of Western Australia's Children and Young People* (Edition 2, July 2014) 257, referring to the Mission Australia Youth Survey 2013 (references omitted).

<sup>122</sup> The perceived opinions of others are incorporated into the evaluation of one's worth as a person': Harter and Whitesell, above n 64, 1035. See also Harter, above n 64, 89; Mead above n 89, 190: 'We assume the generalized attitude of the group, in the censor that stands at the door of our imagery and inner conversations, and in the affirmation of the laws and axioms of the universe of discourse. Quod semper, quod ubique. Our thinking is an inner conversation in which we may be taking the roles of specific acquaintances over against ourselves, but usually it is with the "generalized other" that we converse'.

<sup>123</sup> Although the correlation between self-worth and negative feedback on appearance for any individual is likely to depend on how contingent self-esteem is on appearance for that individual, as well as on how stable that individual's self-esteem actually is.

<sup>124</sup> de Vries, above n 47, 130 (referring to the fact that Chapter 5 demonstrated that when using social media, users seem to take account of the reactions of others); See also Chou and Edge, above n 109 (generally); Schoten, above n 50, 109 (research findings revealed that the tone of others' reactions to things posted on social media had a strong effect on adolescent's self-esteem and wellbeing).

<sup>125</sup> Charon, above n 60, 81 quoting Cooley.

believe themselves to look good.<sup>126</sup> De Vries's doctoral findings suggested that individuals are aware of the importance of looking good on social network sites and that as a result of using such sites are likely to invest in their appearance cognitively and behaviourally.<sup>127</sup> She also speculates that it is possible that the focus on physical appearance in self-presentations on social networking sites might be an important factor in explaining negative self-views, such as increased body dissatisfaction.<sup>128</sup> In turn, these body-related self-views may lead to mental health problems, have an otherwise adverse impact on wellbeing, and involve other detriments.<sup>129</sup> Moreover, as de Vries has also pointed out, body image is such an important aspect of adolescent development that 'negative effects experienced in adolescence may solidify and translate into bigger problems in adulthood.'<sup>130</sup>

The problem, however, is that the choice as to whether or not to display a particular image does not always reside in the hands of the image subject. As noted by Rui and Stefanone, '[d]eliberate image construction is becoming more difficult because of the increasing number of information sources about individuals online'.<sup>131</sup> Echoing that, and referring specifically to the practice of people posting photographs of others online, as well as the practice of 'tagging' people in photographs,<sup>132</sup> Besmer and Lipford observe that people have reduced control over their image and its reach, a fact that may lead to embarrassment or humiliation.<sup>133</sup> Moreover, it has been found that individuals who are 'stigmatised', such as those who are disfigured or overweight, are likely to want to self-present in a way that minimises the impact of the stigma on others' impressions.<sup>134</sup> While these individuals may not be able to entirely conceal their stigma, they may try to avoid disclosure or attempt to cover the stigma.<sup>135</sup> Given that the stigmatised individual may

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<sup>126</sup> See above n 109. See, however, Schlenker, above n 107, 548 who suggests that self-presentation does not involve simply considerations as to how a person wants to be seen, but involves an 'integration' both of how a person wants to be seen and how they can be seen in a given context.

<sup>127</sup> de Vries, above n 47, 129.

<sup>128</sup> Ibid and at 134. This is an area identified by de Vries as ripe for further research (129).

<sup>129</sup> Ibid 134.

<sup>130</sup> Ibid.

<sup>131</sup> Rui and Stefanone, above n 110, 1286.

<sup>132</sup> Facebook, *What is Tagging and How Does It Work?* <<https://www.facebook.com/help/124970597582337>>.

<sup>133</sup> Besmer and Lipford, above n 31, 1563.

<sup>134</sup> Carly R Knight, András Tilcsik, and Michael Anteby, 'The Geography of Stigma Management: The Relationships between Sexual Orientation, City Size, and Self-Monitoring' (2016) 2 *Socius: Sociological Research for a Dynamic World* 1 (generally); Naomi Ellemers and Manuela Barreto, 'Social Identity and Self-Presentation at Work: How Attempts to Hide a Stigmatised Identity Affect Emotional Well-Being, Social Inclusion and Performance' (2006) 62 *Netherlands Journal of Psychology* 51 (generally); Erving Goffman, 'Information Control and Personal Identity' in Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Simon & Schuster, 1991) 41 (generally).

<sup>135</sup> Research conducted by Ducheneaut et al found that across three virtual worlds (including second life) older users or those with weight issues created 'leaner, younger, more fashionable versions of themselves': Nicolas Ducheneaut et al, 'Body and Mind: A Study of Avatar Personalization in Three Virtual Worlds' in *Proceedings of the 27<sup>th</sup> International Conference on Human Factors in Computing Systems* (CHI '09) (ACM Press, 2009) 1151, 1160.

already be susceptible to low self-esteem,<sup>136</sup> removing control over self-presentation from such an individual may have an even more destructive impact on the individual's self-esteem than would otherwise be the case.

Further, it is important to consider that a photograph or video is, by its very nature, the re-contextualisation of a given moment in time: the moment has been transformed from something fleeting, observable only by those present, into something that can be seen by those who were not present and which can be observed repeatedly (possibly for ever). Thus, an appearance-conscious individual, cognisant only of their immediate audience and the transient nature of the 'moment', may exercise less caution about how they appear to others than they would do when aware that they are being photographed or filmed. Foddy and Finighan have made the following observations that, while related to traits of character or behaviour, are arguably pertinent to physical appearance:

It seems reasonable to assume that an individual will have less need to exercise identity strategies when he is with his peers, status equals or intimates because after a time they will develop enough mutual confidence or familiarity to enjoy idiosyncrasy credits. That is, many behavioural quirks and idiosyncrasies may come to be seen as essentially non-threatening, incidental or insignificant to a long-standing relationship.<sup>137</sup>

The fact that people may be comfortable presenting themselves in one context but not in another was recognised in the Discussion Paper issued by SCAG entitled 'Unauthorised Photographs on the Internet and Ancillary Privacy Issues':

People present themselves differently in different public places. For instance, while a person might be comfortable wearing and being seen in a swimsuit at the beach, they might not be comfortable being seen in a swimsuit whilst shopping in a mall. While a person might be comfortable in presenting themselves in a particular way at a beach, a photograph, which facilitates a permanent image, provides a broader context for those images.<sup>138</sup>

A similar point has been made by Westin who described the impact of being photographed, filmed or subject to surveillance in terms of individuals no longer being able to 'merge into the "situational landscape"'.<sup>139</sup> Moreover, given the affordances that exist in the online space, images can take on a dynamic form: images can be re-

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<sup>136</sup> Patrick W Corrigan, Jonathon E Larson and Nicolas Rüsch, 'Self-Stigma and the "Why Try?" Effect: Impact on Life Goals and Evidence-Based Practices' (2009) 8(2) *World Psychiatry* 75, 75. However, not all agree that there is an inevitable link between stigma and low self-esteem; see generally D L Camp, W M Finlay and E Lyon, 'Is Low Self-Esteem an Inevitable Consequence of Stigma? An Example from Women with Chronic Mental Health Problems?' (2002) 55(5) *Social Science and Medicine* 823; Jennifer Crocker and Brenda Major, 'Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma' (1989) 96(4) *Psychological Review* 608.

<sup>137</sup> Foddy and Finighan, above n 60, 9.

<sup>138</sup> Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper, August 2005, 9 [33].

<sup>139</sup> Alan F Westin, *Privacy and Freedom* (Bodley Head, 1967) 31.

contextualised by the addition of text, tags and titles and can be shared across diverse audiences. As Davies has written:

Online images can accrue cumulative meanings from their digital contexts. The process of uploading images to specific Web spaces and thus re-contextualising them invests original artefacts with new meanings, transforming the original narrative or experience from when they came, into new shared experiences, ones which develop meanings as a result of participation and collaboration.<sup>140</sup>

### 3 *Images, Impression Management and Self-Esteem*

Of course, images communicate more about a person than looks. Shim et al assert that the posting of photographs has become 'one of the most apparent components of identity performance on profiles of social network sites'.<sup>141</sup> Likewise, Suler believes images 'give expression to the unconscious dimensions of one's character' and can become a 'representation' that one builds of oneself.<sup>142</sup> A number of other researchers have also found that photographs involve identity statements, or identity claims.<sup>143</sup> Indeed, it has been established that those viewing images make judgements — accurate or otherwise — not only about the image subject's appearance, but about personality, perceived abilities, popularity and happiness.<sup>144</sup>

Accordingly, self-presentation or impression management, as it is carried on through the medium of images of oneself, involves more than managing impressions as to how one *looks*. It involves managing (or even creating) impressions about oneself in general, or particular 'desired for' aspects of oneself.<sup>145</sup> For example, in their research into the choices made by young Indian Muslim women as to the photographs they uploaded to

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<sup>140</sup> Julia Davies, 'Display, Identity and the Everyday: Self-Presentation through Online Image Sharing' (2007) 28(4) *Discourse: Studies in the Cultural Politics of Education* 549, 561.

<sup>141</sup> Shim, Lee and Park above n 108, 489. Claudia Nir, *Identity Construction on Facebook* (BA Hons Thesis, The Institute of Art, Design and Technology, Dun Laoghaire School of Creative Arts, 2012) 30, who writes that: '[s]howing pictures as part of a conversation or assessing pictures to validate social bonds between friends appears to have become an important tool of presenting the self online.'

<sup>142</sup> John Suler, 'Image, Word, Action: Interpersonal Dynamics in a Photo-Sharing Community' (2008) 11(5) *Cyberpsychology & Behaviour* 555, 556.

<sup>143</sup> Siibak, above n 109; Shanyang Zhao, Sherri Grasmuck and Jason Martin, 'Identity Construction on Facebook: Digital Empowerment in Anchored Relationships' (2008) 24 *Computers in Human Behaviour* 1816, 1824; several authors confirm that visual material gives additional important information about the identity of the photo profile owner: Sanja Kapidzic, above n 106, 15; see generally Mehdizadeh, above n 53.

<sup>144</sup> Kirsty Young, 'Managing Online Identity and Diverse Social Networks on Facebook' (2013) 10(2) *Webology* 1, 4 <<http://www.webology.org/2013/v10n2/a109.pdf>>; Hong et al, above n 107, 339; Chou and Edge, above n 109, 117–18; Jaschinski and Kommers, above n 112, 389; Joseph B Walther, Celeste L Slovacek and Lisa C Tidwell, 'Is a Picture Worth a Thousand Words? Photographic Images in Long-Term and Short-Term Computer Mediated Communication' (2001) February, *Communication Research* 105, 126 referring to research of Rind and Gaudet that people can judge some personality dispositions accurately but not others.

<sup>145</sup> See above n 106. Much of the early work on self-presentation was developed from the perspective of sociology or social-psychology and upon the early work of Erving Goffman. However, self-presentation is an important topic in developmental psychology: see Schlenker, above n 107, 542, citing P A Aloise-Young, 'The Development of Self-Presentation: Self-presentation in 6- to 10-Year Old Children' (1993) 11 *Social Cognition* 201.



their social networking profiles, Mishra and Basu found that most respondents ‘seemed to carry the responsibility of upholding the “honor” of their families, a requirement in their offline life, to digital settings as well.’<sup>146</sup>

A number of scholars have described this online impression management by reference to Erving Goffman’s dramaturgical metaphor.<sup>147</sup> Goffman likened the way that individuals present themselves in their social interactions to the way in which actors play roles — the role-playing may convince the audience but does not necessarily reflect the actor’s true, authentic self.<sup>148</sup> Individuals are thus ‘social actors’ and strategically manage the impressions others form of them through this role-playing.<sup>149</sup> The dramaturgical metaphor is extended by reference to what Goffman described as ‘front stage’ and ‘back stage’ settings. As Hogan explains:

In the front stage, we are trying to present an idealized version of the self, according to a specific role: to be an appropriate server, lecturer, audience member, and so forth. The back stage, as Goffman says, is ‘a place, relative to a given performance, where the impression fostered by the performance is knowingly contradicted as a matter of course’.<sup>150</sup>

However, at times an individual’s identity claims can be challenged and the impression an individual wishes to create can be compromised. This, in turn, can give rise to what some have termed a ‘self-presentational predicament’,<sup>151</sup> and others have referred to as a ‘face threat’.<sup>152</sup> In relation to images specifically, a self-presentational predicament can arise because another person publishes or shares an image of the image subject that conflicts

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<sup>146</sup> Smeeta Mishra and Surhita Basu, ‘Family Honor, Cultural Norms and Social Networking: Strategic Choices in the Visual Self-Presentation of Young Indian Muslim Women’ (2014) 8(2) *Cyberpsychology: Journal of Psychosocial Research on Cyberspace*, article 1 <<http://dx.doi.org/10.5817/CP2014-2-3>>.

<sup>147</sup> See generally, Bullingham and Vasconcelos, above n 107; D E Wittkower, ‘Facebook and Dramauthentic Identity: A Post-Goffmanian Model of Identity Performance on SNS’ (2014) 19(4) *First Monday* <<http://firstmonday.org/ojs/index.php/fm/article/view/4858/3875>

doi: <http://dx.doi.org/10.5210/fm.v19i4.4858>>; Claire Davison, *Presentation of Digital Self in Everyday Life: Towards a Theory of Digital Identity* (PhD Thesis, RMIT, 2012); Hogan, above n 109.

<sup>148</sup> Hogan, above n 109, 378. Goffman’s approach explains how individuals present an idealised rather than authentic version of themselves. Charon writes that although Goffman noted that ‘some of our performances may be thoroughly calculated to evoke a particular response; others may be less calculated and much easier to do because they seem more natural to us or more “authentic”’: Charon, above n 60, 192–3. Critics of Goffman, however, argue that it is wrong to describe the backstage self as somehow more ‘authentic’: see, eg, José van Dijck, ‘You Have One Identity: Performing the Self on Facebook and LinkedIn’ (2013) 35(2) *Media, Culture and Society* 199, 201; see also David Buckingham, ‘Introducing Identity’ in David Buckingham (ed) *Youth, Identity, and Digital Media* (MIT Press, 2008) 1, 6.

<sup>149</sup> Nevertheless, as Ellison has noted, while impression management is strategic, it should not necessarily be seen as manipulative or deceptive but rather ‘a natural aspect of human relationships that in many ways can make interactions flow more smoothly and enable individuals to meet their personal and professional goals’: Nicole Ellison, ‘DR3: Social Media and Identity’ (Review for UK Government’s Foresight Project: *Future Identities: Changing Identities in the UK – the Next 10 Years*, 2013) 4.

<sup>150</sup> Hogan, above n 109, 378.

<sup>151</sup> Mark R Leary and Robin M Kowalski, *Social Anxiety* (The Guildford Press, 1995) 87.

<sup>152</sup> Litt et al, above n 31, 458

with the identity claims the individual has made or the impression the individual wishes to 'give off'. Smock has noted that the ability of others to contribute information in the form of photographs to a profile owner's site involves the possibility that this will negatively impact on the self-presentation work (and identity claims) of the profile owner.<sup>153</sup> Besmer and Lipford argue that the practice of tagging a user in a photograph enables others to make decisions about the user's boundaries, a practice that, they argue, can have 'devastating consequences' if the representations conveyed by the image conflict with any of the 'fronts' presented to the many social circles to which that user belongs.<sup>154</sup> While not confined to the visual presentation of individuals by others, Litt et al did find that the posting of information (including photographs) by others can influence and challenge a person's self-presentational goals.<sup>155</sup> They also concluded that these threats were especially challenging when they occurred in the context of social network sites.<sup>156</sup>

A tragic example of an individual's desired-for impression being challenged is the story of Amanda Todd, recounted in Part Five below. Another much less extreme example is that of a person who posts a photograph or video of another that the image subject themselves believes is particularly unflattering. In situations such as this, the publication or sharing of the image can impact on an individual's self-esteem because the image does not portray the image subject in the way that they wish to be seen by others. That is, the image gives rise to a negative self-judgement. An individual might fear, for example, that they will be thought less of or rejected as a result of this unfavourable impression, regardless of whether these consequences actually ensue. In this regard, Besmer and Lipford found that respondents were often

keenly aware of individuals who they were concerned of seeing an unwanted photo of them. These concerns were not about the public or strangers viewing their photos, but instead about those who were already within their social circles. Family members such as moms, dads, sisters, and brothers comprised most of the perceived threat. Extended

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<sup>153</sup> Smock, above n 31, 4.

<sup>154</sup> These devastating consequences may be mitigated to some extent by the fact that Facebook has introduced the option for users to approve of tags before the photograph in which they are tagged appears on their Facebook page. Nevertheless, this involves any given user understanding and utilising the privacy settings to provide for this (the default setting is that photographs will appear on a user's profile as soon as the user is tagged). Moreover, it is important to remember that even if a person un-tags themselves in a photograph or does not approve of the tag, the photograph itself will remain attached to the profile of the person who uploaded it. Names can be attached to photographs of non-account holders of Facebook — technically these are not 'tags' because they do not link the photograph to a user's profile — any non-account holders who are named in photographs will not be aware that they have been named and certainly have no control over the photograph appearing on Facebook: Facebook, *Tagging* <<https://www.facebook.com/help/366702950069221/>>.

<sup>155</sup> Litt et al, above n 31, 458.

<sup>156</sup> Ibid.

family members and friends were also mentioned as well as employers and organizations to which the participant belonged.<sup>157</sup>

Compounding the potential threat to individuals of others posting images that challenge that individuals' self-presentation goals, research suggests that people are more influenced by the presentation of a person made by others than they are by self-presentations. This outcome relates to the fact that other-provided information is less 'susceptible to manipulation' (a factor referred to as warranting principle).<sup>158</sup>

Nevertheless, a self-presentational predicament can even arise when images are published by the image subject themselves. Self-published or self-shared images can also give rise to unintended consequences. An example of this is given by Mayer-Schönberger in the opening of his book *Delete: The Virtue of Forgetting in the Digital Age*. Mayer-Schönberger tells how Stacey Snyder was denied her teaching certificate after posting a photograph of herself dressed as a pirate on her MySpace page with the caption 'drunken pirate'. The photograph demonstrated what the university officials described as behaviour 'unbecoming of a teacher'.<sup>159</sup> Another example occurred in 2008, when it was

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<sup>157</sup> Besmer and Lipford, above n 31, 1565: note, however, that this research was carried out among young adult users rather than with children. Hammer's doctoral research found that images posted on social media with an emphasis on drinking alcohol did have a negative effect on the way potential employers perceived of the image subject as a potential employee: Bennet Hammer, *A Picture is Worth a Thousand Words, but Are They the Words That Matter? – An Analysis of the Effects of Image Comments on Social Networking Sites* (PhD Thesis, Nova Southeastern University, 2014) Abstract.

<sup>157</sup> Mishra and Basu, above n 146.

<sup>158</sup> Rui and Stefanone, above n 110, 1290 referring to Joseph B Walther and Malcom R Parks, 'Cues Filtered Out, Cues Filtered In: Computer Mediated Communication and Relationships' in Mark L Knapp and John A Daly (eds), *Handbook of Interpersonal Communication* (Sage, 3<sup>rd</sup> Edition, 2002) 529, 529. See also Joseph B Walther et al, 'Self-Generated Versus Other-Generated Statements and Impressions in Computer Mediated Communication: A Test of Warranting Theory Using Facebook' (2009) 36(2) *Communication Research* 229; Jaschinski and Kommers, above n 112, 389. See also Smock, above n 31, 11 referring to the adaptation of signalling theory in a computer mediated communication context and citing research by Donath and boyd (references omitted) and the fact that presentations of a person by others (these are termed 'assessment signals'), are likely to be more reliable than self-presentations (these are generally 'conventional cues', and are less reliable because they are easier to fake). Brandtzæg et al found that young people were indeed concerned that friends in the social network could create and define the user's self-presentations: Petter Bae Brandtzæg, Marika Lüders, and Jan Håvard Skjetne, 'Too Many Facebook "Friends"? Content Sharing and Sociability Versus the Need for Privacy in Social Network Sites' (2010) 26 (11-12) *International Journal of Human-Computer Interaction* 1006, 1019. These concerns were echoed by Facebook users in field-work carried out by Katherine Sarah Raynes-Goldie, *Privacy in the Age of Facebook: Discourse, Architecture, Consequences* (PhD Thesis, Curtin University, 2012) and in findings of research conducted by Litt et al, above n 31, 449.

<sup>159</sup> Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2011) 1. Mayer-Schönberger writes that although the prospective teacher considered removing her photograph, the damage had been done as the web page containing the photograph had already been catalogued by search engines and archived by web-crawlers. Another similar example was reported in the press in 2011. A young teacher in the United States was reportedly asked to resign or face dismissal from her position due to the fact that she has posted pictures of herself on her Facebook page that showed her, during a trip to Europe, holding alcoholic drinks. The teacher's employer reportedly found out about the posts after an anonymous parent at the school notified the school board, by email, after having seen the posts. The teacher was reportedly 'baffled' as to how the parent could have obtained access to her Facebook

reported that over one hundred high school students in the United States had been reprimanded and a number suspended from sporting or other extracurricular activities after their school obtained photographs of the students partying. It seems that some of the photographs may have been posted by the subjects themselves on their own Facebook profiles, or had at least been published on the students' own Facebook pages with their permission.<sup>160</sup> Such predicaments have the capacity to affect an individual's relationships (as outlined in Part Six below) or prospects and this can act back on that individual's self-esteem. Self-esteem may also be more directly affected, however, where an individual adopts a negative self-judgement as a result of the self-presentational predicament.

### *(a) Context Collapse*

Referring to a number of articles that employ Goffman's dramaturgical metaphor to liken online environments to performance spaces (or even to 'backstage' spaces),<sup>161</sup> Hogan argues that there is a key difference between the self-presentations often advanced online, particularly in social networking sites, and those advanced in face-to-face interactions. The difference is that in the online environment the self-presentation is 'recorded' (in other words, not live) and thus the nature of the self-presentation has changed from something ephemeral — a performance, bounded in time and space — to something that continues to exist beyond the performance itself and that can be taken out of its context.<sup>162</sup> Importantly, then, a representation of self in the form of a recorded

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photographs, given that her privacy settings were on 'high'. See 'Teacher Sacked for Posting Picture of Herself Holding Glass of Wine and Mug of Beer on Facebook', *Daily Mail* (online) 7 February 2011. Similarly, in 2012 it was reported that a woman was fired from her position due to a photograph, posted on her own Facebook page, depicting her making disrespectful gestures while on a work trip to a veteran's cemetery. The photograph went 'viral' and provoked such an angry response (it was reported that a Facebook Group 'Fire Lindsay Stone' set up to demand her resignation attracted more than 5,000 'likes') that the woman's employer was forced to post its own statement on Facebook distancing itself from her actions: see Cavan Sieczkowski, 'Lindsay Stone, Plymouth Woman, Takes Photo at Arlington National Cemetery, Causes Facebook Fury' *The Huffington Post* (online) 20 November 2012 <[http://www.huffingtonpost.com/2012/11/20/lindsey-stone-facebook-photo-arlington-national-cemetery-unpaid-leave\\_n\\_2166842.html](http://www.huffingtonpost.com/2012/11/20/lindsey-stone-facebook-photo-arlington-national-cemetery-unpaid-leave_n_2166842.html)>. See also Associated Press, 'California Coaches, Teacher, Suspended for Wearing Blackface', *Fox News.com* (online) 2 November 2013 <<http://www.foxnews.com/us/2013/11/02/california-coaches-teacher-suspended-for-wearing-blackface/>>.

<sup>160</sup> Thus, a student who was reprimanded was reported as saying that: 'the school's actions are likely to put a dent in underage drinking among students but not stop it. Kids will just be smarter about not posting party and drinking photos': Mary Lynn Smith and Courtney Blanchard, 'Facebook Photos Land Eden Prairie Kids in Trouble' *StarTribune* (online), 9 January 2008 <<http://www.startribune.com/local/west/13549646.html>>.

<sup>161</sup> Hogan notes that some authors have suggested that sites, such as Facebook, that involve a level of access control (eg Facebook sites or certain content within Facebook may be private or restricted to 'friends' or 'friends of friends') can be likened to 'backstage spaces' as they enable the site owner to control access (referring specifically to boyd (2006), Lewis et al (2008), Robinson (2007) and Tufekci (2008)), a view he disagrees with: Hogan, above n 109, 379–80.

<sup>162</sup> Hogan, above n 109, 380–2. Hogan refers to this non-live self-presentation as an exhibition (refer page) note that Hogan clarifies that exhibitions are still a type of self-presentation but they often involve recordings of past performances. See generally Nicole C Krämer and Nina Haferkamp, 'Online Self-Presentation: Balancing Privacy Concerns and Impression Construction on Social Networking Sites' in Sabine

presentation (such as a photograph or video) can be replayed to quite a different audience and, potentially, to one it was not intended for.<sup>163</sup> Reinforcing this point, Davison's research led her to conclude that:

The stage of Social Media gives individuals the opportunity to present their Identity [sic] to audiences, but the element of technology and misunderstanding of privacy settings can blur the lines between onstage and backstage performances.<sup>164</sup>

The relaying of information about a person to an audience for which it was not intended was recognised as potentially problematic by Goffman and has been widely accepted subsequently.<sup>165</sup> In the online environment the potential for information to be relayed to an audience for which it was not intended is considerable. In the context of social networking sites, where individuals often have links with members of different audiences (family, friends, work colleagues, professional contexts), usually discrete audiences are merged into one<sup>166</sup> – a phenomenon that has been termed by some as 'context collapse'.<sup>167</sup>

This phenomenon of context collapse has been explored widely by researchers seeking to discover how it affects both the self-presentations individuals make in the online environment, and the way in which their self-presentations are received. For example, Binder et al hypothesised that social networking sites could 'bring social spheres into conflict and lead to increased levels of social tension'.<sup>168</sup> They concluded that individuals might have to 'uphold structural (offline) features of their networks that are ignored by the technology'.<sup>169</sup> Houghton et al, noting that the need to control the flow of personal information into different types of relationships is 'central to our social world', argue that managing social spheres becomes complicated in the online environment and that such

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Trepte and Leonard Reinecke (eds) *Privacy Online: Perspectives on Privacy and Self-Disclosure in the Social Web* (Springer-Verlag, 2011) 127, contrasting online and off-line self-presentations.

<sup>163</sup> Hogan, above n 109, 381: 'content may be produced and submitted with a specific audience in mind, but those who view and react to this content may be different from those for whom it was intended (if it was intended for anyone in particular to begin with).'

<sup>164</sup> Davison, above n 147, 236.

<sup>165</sup> Erving Goffman, *The Presentation of Self in Everyday Life* (Penguin, 1961) 121 ('When audience segregation fails and an outsider happens upon a performance that was not meant for him, difficult problems in impression management arise'). See also Robert S Tokunaga, 'Friend Me or You'll Strain Us: Understanding Negative Events That Occur over Social Networking Sites' (2011) 14(7–8) *Cyberpsychology, Behavior, and Social Networking* 425, 426; Smock, above n 31, 3; Hogan, above n 109. Other researchers have described this as the 'problem of conflicting social spheres': see (generally) Jens Binder, Andrew Howes and Alistair Sutcliffe 'The Problem of Conflicting Social Spheres: Effects of Network Structure on Experienced Tension in Social Network Sites' (2009) *CHI 2009 Social Networking Series* 965.

<sup>166</sup> danah boyd, 'Why Youth (Heart) Social Network Sites: the Role of Networked Publics in Teenage Social Life' in David Buckingham (ed) *Youth, Identity, and Digital Media* (MIT Press, 2008) 119, 131-134.

<sup>167</sup> See, eg, Michael Wesch, 'YouTube and You: Experiences of Self-Awareness in the Context Collapse of the Recording Webcam' (2009) 8(2) *Explorations in Media Ecology* 19; Alice E Marwick and danah boyd, 'I Tweet Honestly, I Tweet Passionately: Twitter Users, Context Collapse, and the Imagined Audience' 2010 *New Media and Society* 1; Raynes-Goldie, above n 158, 196-204.

<sup>168</sup> Binder, Howes and Sutcliffe, above n 165, 965.

<sup>169</sup> Ibid 966.

complications may lead to privacy harms.<sup>170</sup> Likewise, Rui and Stefanone found that successfully managing online impressions grew more difficult as messages were broadcast across wide networks<sup>171</sup> where ‘groups within the macro network [were] likely to have inconsistent expectations’ regarding how an individual presents themselves.<sup>172</sup>

Related to the issue of context collapse, Bernstein et al found that people consistently underestimated the audience size for content posted on social media.<sup>173</sup> This finding led Litt et al to suggest that if this is the case for the information people post about themselves —where people generally can be expected to have some awareness of the likely audience and actual knowledge of their privacy settings — the impact might be greater in respect to postings of information about and photographs of another.<sup>174</sup> Litt et al’s own research findings bore out their hypothesis. The researchers concluded that:

The majority of other-generated face threats described by our participants occurred primarily because others had difficulty navigating and/or lacked motivation in understanding the targets’ diverse audiences. They often shared information about the target that may have been normative in one context or with one audience, but violated another audience’s expectations ... This resulted in many frustrating or difficult experiences for our participants, who then had to deal with the face threat consequences.<sup>175</sup>

The phenomenon of context collapse and the uncertainty of the current and future audience of information available online can therefore make it more difficult for individuals to manage impressions about themselves, particularly within a social media environment. This is so whether those impressions originate from the individual themselves or from another. In turn, this can impact on an individual’s self-esteem either directly (because the perception of how they are seen by others, or how they might be seen, impacts upon an individual’s self-judgement) or indirectly (for example, as a result of consequences for an individual’s relationships that flow from the impression that is created). However, the impact on an individual’s self-esteem of an unwanted or

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<sup>170</sup> David J Houghton and Adam N Joinson, ‘Privacy, Social Network Sites, and Social Relations’ (2010) 28 (1–2) *Journal of Technology in Human Services* 74, 78.

<sup>171</sup> Rui and Stefanone, above n 110, 1292.

<sup>172</sup> Ibid. See also (generally) Wouter M P Stejin and Alexander P Schouten, ‘Information Sharing and Relationships on Social Networking Sites’ (2013) 16(8) *Cyberpsychology, Behavior, and Social Networking* 582 who investigated some of the strategies that people could use to manage their impressions across a diverse network.

<sup>173</sup> Michael S Bernstein et al, ‘Quantifying the Invisible Audience in Social Networks’ (2013) CHI ‘13 *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems* 21, 21. Smock also refers to the affordances of Facebook and notes that comments added to an image in Facebook cause that image, and the album in which it is located, to become attached to the network of the person adding the comment, thereby adding another potential audience: Smock, above n 31, 6.

<sup>174</sup> Litt et al, above n 31, 449.

<sup>175</sup> Ibid 458.

unfavourable impression is not a given — not least because an individual might successfully adopt a strategy in response to such impressions.

*(b) Strategies Used to Protect Oneself in Response to Other-Presented Information*

The issue of personal information about one person being revealed by another is neither a recent phenomenon nor one that exists solely in the online sphere. In 1978 Baumeister and Jones discussed one strategy employed by those whose self-presentation goals (or identity claims) were challenged by information released about them by others. They found that such individuals compensated through the presentation of ‘enhanced information’ not currently in the possession of the audience.<sup>176</sup>

A number of other researchers have considered the compensatory tactics adopted by individuals whose self-presentations are threatened by information posted by others.<sup>177</sup> Schlenker explains that individuals may adopt any one of three ‘accounting strategies’ to manage a self-presentation predicament: they may defend their innocence, offer an excuse, or seek to justify the relevant presentation.<sup>178</sup> More recently, however, Smock has found that in the context of Facebook, the affordances of the site present additional tools for managing conflicting information, including the deletion by a user of information posted to that user’s site (such as wall posts) and the un-tagging of themselves in photographs posted by others.<sup>179</sup> Besmer and Lipford found that individuals routinely untagged themselves in photographs that were considered ‘incriminating’ as well as ‘unflattering’.<sup>180</sup> Smock termed as ‘subtractive’ those strategies whereby users simply removed information about themselves (or did what they could to remove access to information or the ease with which they would be identified in information). In terms of information presented by others on Facebook, these subtractive strategies were, according to Smock, more common than ‘repudiative strategies’ (or the ‘accounting strategies’ referred to by Schlenker).<sup>181</sup>

The extent to which any given individual is motivated to take a self-protective measure in relation to the online publication of an unwanted image is likely to depend on a number

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<sup>176</sup> See generally, Roy F Baumeister and Edward E Jones, ‘When Self-Presentation is Constrained by the Target’s Knowledge: Consistency and Compensation’ (1978) 36(6) *Journal of Personality and Social Psychology* 608.

<sup>177</sup> Rui and Stefanone, above n 110, 1290: ‘The literature highlights a range of strategies for protective self-presentation in response to unwanted other-provided information’; Schlenker, above n 107, 560 referring to various research on the effectiveness of accounting strategies.

<sup>178</sup> Schlenker, above n 107, 560: Schlenker also discusses the fact that when individuals find themselves in a self-presentation predicament, they may simply apologise for themselves — admit blame and express regret.

<sup>179</sup> For example, Smock found that 50% of respondents reported untagging themselves from photographs that may cause them to be viewed negatively: Smock, above n 31, 21.

<sup>180</sup> Besmer and Lipford, above n 31, 1565.

<sup>181</sup> Smock, above n 31, 22–23. Schlenker explains that repudiative strategies (what he actually terms ‘accounting strategies’) involve defences of innocence, excuses and justifications: Schlenker, above n 107, 560.

of variables. For example, Forest and Wood found that individuals with low self-esteem placed a premium on the goal of self-protection and may, as a result, seek to avoid or limit self-disclosure where possible.<sup>182</sup> Conversely, Christofides et al found that people with high self-esteem were more likely to control their information, such as by utilising privacy settings to protect their personal information on Facebook.<sup>183</sup> Rui and Stefanone suggested that gender, as well as the particular contingencies upon which an individual stakes their self-worth (for example, whether the individual is particularly motivated by appearance) will impact upon the extent to and ways in which that person will adopt self-protective measures to combat an unwanted presentation of themselves by others.<sup>184</sup>

Regardless of motivation, however, the *ability* of a given individual to take any self-protective measures depends upon a number of factors. Firstly, it requires that individual to be aware of the presentations made by others. Secondly, the nature of the presentation and the means available to the individual to address their target audience will impact on the person's capacity to adopt a particular (or any) self-protective measure. Finally, an individual's ability to manage and respond to the way in which they are presented by others depends on variables such as age and education level.

To put the above in the context of images of a person posted online by another, in order to take self-protective measures in relation to an image, the image subject needs firstly to be aware that the image exists. Secondly, the image subject needs to have the ability to adopt a responsive strategy in relation to images of which they are aware. If images are posted to a social networking site such as Facebook or MySpace, or a photo sharing site such as Instagram, the image subject is more likely to be aware of the existence of the image when the image subject also has an account with that social media provider.<sup>185</sup> One of the ways individuals can become aware of images of themselves is through the practice of 'tagging'. Where a person is tagged in a photograph on a social networking site, and that person also has an account with the same social media provider, the person tagged becomes aware of this. Ironically then, while photo tagging may be a means by which photographs of oneself become available to an unintended audience, it is also a way in which users become aware of what images of themselves exist. Although users are not able to delete from another's account photographs in which they are tagged, they are able to review and remove the tags should they choose to do so.<sup>186</sup> Besmer and Lipford

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<sup>182</sup> Forest and Wood, above n 95, 296 (FN2).

<sup>183</sup> E Christofides, A Muise and S Desmarais, 'Information Disclosure and Control on Facebook: Are they Two Sides of the Same Coin or Two Different Processes?' (2009) 12(3) *CyberPsychology & Behaviour* 341, 343.

<sup>184</sup> Rui and Stefanone, above n 110. See, also Jian Rui and Michael A Stefanone, 'Strategic Self-Presentation Online: A Cross-Cultural Study' (2013) 29(1) *Computers in Human Behaviour* 110.

<sup>185</sup> A social media provider is defined here to mean an internet content host that is also a social media service. A social media service has the meaning given to that term in the *Online Safety Act* s 9. An internet content host is a person who hosts internet content in Australia, as per the definition in the *Broadcasting Standards Act 1992* (Cth) sch 5, cl 91(1)(b). See, further, the list of defined terms used in this thesis.

<sup>186</sup> So, for example, removing a tag will prevent the photograph from being automatically associated to a user's account or attached to their profile. However, only the tag and not the photograph can be deleted.



found that among their survey participants, social networking users were well aware of this benefit of photo tagging, with one posing the rhetorical question: 'What if it's [sic] pictures out there that you're not tagged in? How do you know that the picture is out there?'<sup>187</sup>

Nevertheless, there are many individuals who do not participate in even the most popular social networking sites,<sup>188</sup> either because they choose not to or because they are actually too young to do so. In order to join Facebook, for example, an Australian child should be at least 13 years of age.<sup>189</sup> Conversely, names can be attached to the depictions of any individual in a photograph regardless of age, and this is something for which Facebook in particular has attracted criticism.<sup>190</sup> Therefore, individuals might not only be depicted in an image on a social networking site, but might be identified by name in that image. Unless the image subject is tagged in the photograph and has an account with the social media provider, they will have no ability to remove the linking of that image with their name, even assuming that they become aware of the existence of the image. Moreover, there are a number of other online spaces where people can contribute images of others, for example, YouTube. Because these sites do not have the same tagging affordances as social network sites like Facebook, it is possible for individuals to be identified in images but to remain unaware of the existence of the image in question or, where they are aware, to have no ability to remove the linking of the image with their name.<sup>191</sup>

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Therefore, where the photograph is posted on a site whose audience has significant overlap with that of the image subject, the removal of the tag may have limited effect (eg 'friends' of the person posting the image may be in the same social circle as the image subject and will therefore still be able to view the picture, and recognise the image subject even when the tag no longer exists).

<sup>187</sup> Besmer and Lipford, above n 31, 1566.

<sup>188</sup> Statistics for February 2016 suggest that Facebook continues to be the most popular social media site in Australia, with approximately 15 million users, or 62.5% of the population. The next most popular sites are YouTube, WordPress.com and then Instagram: David Cowling, 'Social Media Statistics Australia – February 2016' *Social Media News* (online), 1 March 2016 <<http://www.socialmedianews.com.au/social-media-statistics-australia-february-2016/>>. A report by Sensis in 2015 shows that Facebook dominates the market for social media users in Australia, capturing 93% of social media users, while the next most popular sites among users are Linked-In (28%), Instagram (26%) and Google+ (23%): Sensis, *Sensis Social Media Report May 2015: How Australian People and Businesses are Using Social Media* (May 2015) 5.

<sup>189</sup> Facebook, *Statement of Rights and Responsibilities* (30 January 2015) <<https://www.facebook.com/legal/terms>> term 4(5): 'You will not use Facebook if you are under 13'. Of course it is possible of individuals younger than 13 to set up a Facebook account by lying about their age, or enlisting the help of their parents. In 2012 the Sydney Morning Herald reported that a Queensland school principal had threatened to expel pupils under 13 who refused to delete their Facebook accounts in what was described as 'a bold bid to stamp out cyber bullying at her school': see Nicole Brady, 'Quit Facebook or be Expelled, School Says' *The Sydney Morning Herald* (online), 16 May 2012 <<http://www.smh.com.au/technology/quit-facebook-or-be-expelled-school-says-20120516-1yqp0.html>>. See also Nicole Ellison, above n 149.

<sup>190</sup> Anna Bunn 'Facebook and Face Recognition, Kinda Cool, Kinda Creepy' (2014) 25(1) *Bond Law Review* 35, 61–62.

<sup>191</sup> For example, because they are recognisable in a video clip or photograph, or because they are identified in the title attached to the video or the description posted with the video.

Given the above, it is to be expected that younger children will find it more difficult to adopt self-protective strategies. Moreover, a person's ability to manage impressions can be affected by a relative lack of experience in manipulating or managing those impressions, whether in the online or offline world.<sup>192</sup> Moekotte et al conducted a study of 'at risk students' and returning early school leavers.<sup>193</sup> They found that although all participants used social media,<sup>194</sup> there was a great deal of hesitancy on their part to engage with others online in a way that would enhance opportunities for social or economic participation.<sup>195</sup> Many of the participants expressed doubt that they even had strong points that could be used for online self-presentation,<sup>196</sup> which might suggest that such individuals are particularly vulnerable in the face of information presented about them by others. A person's ability to effectively manage online impressions of themselves will also depend, to a large degree, on the extent to which they are familiar with technology and the internet. Litt et al found, indeed, that when confronted by threats to self-presentation in the context of Facebook, those with greater skills in manipulating the technology were better able to ameliorate the threats in question.<sup>197</sup>

Accordingly, the nature of the site to which an image is posted, as well as the age, experience and skill set of the image subject, are likely to affect whether or not an image subject is able to adopt subtractive or repudiative strategies in relation to the image in question. In turn, those individuals who lack the capacity to adopt a successful strategy in response to a self-presentational predicament, or an unfavourable impression, are arguably more likely to experience low self-esteem when faced with such a predicament or impression.

### *C Control Over Image as a Reflection of Relational Value and Autonomy*

As discussed above, the extent to which a person is able to successfully manage impressions of themselves is likely to impact on their self-esteem. This occurs because an individual's self-judgement is influenced not only by what others think and how others respond to them but by that individual's own perception of the actual or likely responses of others to the presentations of self that are made. Self-esteem is maintained or even raised when a person receives favourable responses or when they believe that they have made a favourable impression on others. Self-esteem is also maintained when the impression put forward is consistent with a given identity claim that the individual has made, or with a 'front' they wish to present to a particular audience. According to Altman, however, the extent to which a person is able to regulate boundaries, or self-

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<sup>192</sup> Young, above n 144, 15: noting that adult users have the life experience to successfully manage their online impressions and that youth would benefit from observing these skills.

<sup>193</sup> P B F Moekotte et al, 'Early School Leavers' Attitudes Towards Online Self-Presentation and Explicit Participation' (2015) 49 *Computers in Human Behaviour* 171.

<sup>194</sup> Ibid 179.

<sup>195</sup> Ibid 182.

<sup>196</sup> Ibid 179.

<sup>197</sup> Litt above n 31, 459.

presentations, can also provide more direct feedback on self-worth by informing a person about their relational value:

In one sense, the ability to regulate boundaries (and the failure or extreme cost in so doing) provides a person with basic information regarding the social definition of the self, i.e., it tells a person what the social world thinks of him as manifest in its behavior towards him. If I see that I cannot regulate inputs from others or outputs to them when I desire to do so, I am therefore provided with some important information about the social environment and my ability to regulate it. If this happens with many people and in many situations, i.e., I can seldom be private, then such information will contribute to how I ultimately define myself as a person.<sup>198</sup>

In other words, the extent to which an individual can control access to themselves (and by extension, personal information about themselves) is itself a source of feedback about that individual's relational value and, as such, may impact upon self-worth or self-esteem. This is quite apart from and in addition to the *consequences* that may flow from a particular failure to regulate boundaries or control information.

Reinforcing Altman's view, and referring to other researchers' findings, Valkenberg et al note that control over one's environment is one of the two most important predictors of self-esteem. They posit that online communication may provide adolescents with the ability to control what they want others to know about them, as they can 'create or modify the presentation of themselves, and they can choose the pace, breadth and depth of self-disclosure'.<sup>199</sup> However, as discussed in Section B of this Part, above, individuals in fact have little control over the way in which *others* present them in the online context, including by way of images of themselves that others might choose to upload and share. There is the risk that individuals will be presented in a way that conflicts with their identity claims and their desired-for impressions. Compounding this lack of control is the nature of the online environment itself. As was noted in Chapter One and as will be discussed in Part Six below, information, including images, once online can remain so permanently and can be catalogued, indexed, stored, linked to other information and often freely reproduced without the control or even knowledge of the image subject.

As much as self-presentation involves deciding what of oneself to present, it also involves deciding what of oneself to keep back, and these decisions may be experienced as volitional. Indeed, Livingstone has observed that for teenagers the decision as to what *not* to say about themselves online is an 'agentic act to protect their identity and their spaces of intimacy'.<sup>200</sup> Conversely, where images of one individual are posted by another, the image subject may sense a loss of control or volition over the decision as to whether and

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<sup>198</sup> Irwin Altman, 'Privacy a Conceptual Analysis' in Daniel H Carson (ed) *Man-Environment Interactions: Evaluations and Applications, Part II* (Dowden, Hutchinson Press, 1974) (Section 6: Privacy) 3, 22.

<sup>199</sup> Valkenburg and Peter, above n 51, 123 .

<sup>200</sup> Sonia Livingstone, 'Taking Risky Opportunities in Youthful Content Creation: Teenagers' Use of Social Networking Sites for Intimacy, Privacy and Self-Expression' (2008) 10(3) *New Media & Society* 393, 406.

how to present themselves. This is also significant because it has been found that people have a universal and fundamental psychological need to feel, among other things, that they are the authors and agents of their own behaviour (and thus self-regulating or autonomous).<sup>201</sup>

An established body of research has found that individuals who lack a subjective sense of autonomy may experience lower wellbeing and non-optimal functioning.<sup>202</sup> A sense of autonomy has been found to correlate closely with feelings of relatedness<sup>203</sup> and to be something that assists in the construction of a personal identity<sup>204</sup> and emotional functioning.<sup>205</sup> A sense of having little control over life circumstances, conversely, has been determined as a suicide risk factor.<sup>206</sup> While there are numerous factors that influence any given individual's subjective sense of control, it would seem reasonable to suggest that losing control over one's image and thus one's ability to define oneself may contribute to an overall sense of not being in control of life circumstances. This is particularly so if an image over which a person has no control presents them in a way that they believe is unfavourable or which conflicts with an identity claim they have made vis-a-vis the audience (or a section of it) who will have access to the image. The consequences for an individual of loss of autonomy over an image is illustrated by the sad story of Amanda Todd, who took her own life after being subjected to a long period of bullying. The bullying, described in more detail in the section on relationships below, related to a photograph of Amanda that had been placed online. Before her death, Amanda recorded

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<sup>201</sup> Duane Rudy et al, 'Autonomy, Culture and Well-Being: The Benefits of Inclusive Autonomy' (2007) 4 *Journal of Research in Personality* 983, 984.

<sup>202</sup> Ronald Fischer and Diana Boer, 'What is More Important for National Well-Being: Money or Autonomy? A Meta-Analysis of Well-Being, Burnout, and Anxiety Across 63 Societies' (2011) 101(1) *Journal of Personality and Social Psychology* 164, 167. See generally Richard M Ryan and Edward L Deci, 'Self-Regulation and the Problem of Human Autonomy: Does Psychology Need Choice, Self-Determination and Will?' (2006) 74(6) *Journal of Personality* 1557; Gary B Melton 'Decision Making by Children: Psychological Risks and Benefits' in Gary B Melton, Gerald P Koocher and Michael J Saks (eds) *Children's Competence to Consent* (Springer, 1983), Chapter Two, 21.

<sup>203</sup> See generally, Barbara A Oudekerk et al, 'The Cascading Development of Autonomy and Relatedness From Adolescence to Adulthood' (2015) 56(2) *Child Development* 472; A Taradash et al, 'The Interpersonal Context of Romantic Autonomy in Adolescence' (2001) 24(3) *Journal of Adolescence* 365.

<sup>204</sup> Charles C Helwig, 'The development of Personal Autonomy throughout Cultures' (2006) 21 *Cognitive Development* 458, 458. Altman posited the link between the achievement of self-identity and the ability to control access to self through the employment of privacy mechanisms as follows: 'Privacy mechanisms define the limits and boundaries of the self. When the permeability of these boundaries is under the control of a person a sense of individuality develops. But it is not the inclusion or exclusion of others that is vital to self definition; it is the ability to regulate contact when desired. If I can control what is me and what is not me, then I can define what is me and not me, and if I can observe the limits and scope of my control, then I have taken major steps towards understanding and defining what I am. Thus, privacy mechanisms serve to help define me. Furthermore, the peripheral functions to which control is directed — regulation of interpersonal interaction and self/other interface processes ultimately serve the goal of self-identity': Irwin Altman, above n 48, 50.

<sup>205</sup> Lili Qin, Eva M Pomerantz and Qian Wang, 'Are Gains in Decision-Making Autonomy During Early Adolescence Beneficial for Emotional Functioning? The Case of the United States and China' (2009) 80(6) *Child Development* 1705.

<sup>206</sup> Government of Western Australia, above n 81, 28 (Table 3).

a silent YouTube video, using a series of handwritten notes to tell her story. On one of those notes (Figure 1, below) Amanda writes: 'I can never get that photo back'. On the next note she continues, '[i]t's out there forever'.<sup>207</sup>



**Figure 1: Still from YouTube video by Amanda Todd, recorded before she committed suicide after a semi-nude photograph of her was posted onto the internet<sup>208</sup>**

#### *D Summary of Issues in this Part*

This part of the chapter began by discussing the developmental significance of self-esteem. It was noted that there is a well-documented and researched correlation between high self-esteem and a number of positive outcomes in terms of emotional wellbeing, physical health, social interaction and behaviour. Conversely, there is significant correlation between low self-esteem and a number of problems, including depression. Low self-esteem has also been identified as a risk factor in suicide, including youth suicide.

The link between appearance and self-esteem was noted. It was suggested that where an individual receives negative feedback or a negative response to their appearance in an image, this may have a detrimental impact on that individual's self-esteem. This is particularly the case if the individual's self-worth is especially contingent upon their appearance. However, it was also noted that what acts upon an individual's self-esteem is not only the way in which others actually respond to the individual, but that individual's perception of what others think or will think of them. Self-esteem is, however, not only linked to appearance but to the impressions one makes, or believes one has made, on others. The centrality of the judgement of others (or the 'generalised other' as described by Cooley) thus motivates individuals to engage in more or less conscious self-presentation, or impression management. Generally individuals seek to create favourable (although not necessarily unrealistic) impressions of themselves as well as impressions that are consistent with their various identity claims.

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<sup>207</sup> Amanda Todd, *Amanda Todd's Story: Struggling, Bullying, Suicide, Self Harm*, Chia Videos (11 October 2012) <<https://www.youtube.com/watch?v=ej7afkypUsc>>.

<sup>208</sup> Ibid.

Self-provided personal information or other-provided personal information, including images, can result in a conflict with an individual's identity claims or with their self-presentation goals (such as, in the context of images, where an image is incriminating or unflattering). The potential for conflict to occur when information, including images, is published or shared online may be greater than in a face-to-face context. This is due both to the potential size of the audience and to the phenomenon known as 'context collapse.' Context collapse describes the fact that the boundaries between different audiences that can be maintained in real life are more difficult if not impossible to maintain in the online environment. Where there is a 'collision of contexts' or an individual's self-presentational goals are otherwise challenged or compromised, this can provoke an unfavourable response to the individual on the part of others (for example, the individual may be teased, bullied, excluded and so forth). This response, in turn, may impact on the individual's self-esteem. Moreover, self-esteem can be affected because of an individual's self-judgement about the way in which they are seen by others.

However, it must be stressed that a negative impact upon self-esteem is not a given, not least because individuals facing self-presentation predicaments may successfully engage in self-protective behaviour to 'repair the damage'. In the online context, the extent to which an individual has the ability to engage in self-protective behaviour depends on a number of factors, including whether they have knowledge of the 'compromising' information and the affordances and privacy controls of the medium in which the image is published (whether, for example, the individual has the ability to remove or request the removal of pictures or tags). It also depends on the individual themselves; younger children and early school leavers in particular may be less able to successfully employ self-protective behaviour. Moreover, every individual is different. Harter has suggested that some individuals have a relatively stable level of overall self-esteem, which may be reasonably immutable to social feedback, whereas for others self-esteem is more volatile and subject to influence by the reactions of others.<sup>209</sup>

It has also been noted that an individual's self-esteem may also be affected more 'directly' by the extent to which that individual is able to control the presentation of self and regulate interpersonal boundaries. Reference was made to Altman's theory of privacy and the suggestion that the ability (or otherwise) of an individual to control their interpersonal boundaries, which includes the ability to manage impressions given off, provides important information about that person's relational value and, thus, acts back upon self-definition (and, by implication, self-esteem). It was noted that a lack of control over whether and how the self is presented may also contribute to an individual's overall sense of control over life, whereby a sense of little control is generally indicative of less than optimal functioning and may also be a risk factor in suicide.

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<sup>209</sup> Harter and Whitesell, above n 64, 1054.

## V RELATIONSHIPS

Whereas Part Four considered the impact on an individual's self-esteem of the online publication and use of images, this part of the chapter considers the impact on relationships of the unwanted online publication or use of images.

### A *Relationships and Development*

In so far as the goals of adolescence have been identified as identity formation, autonomy, intimacy and the development of the sexual self,<sup>210</sup> an individual's relationship with others is central to all of these goals. As discussed in Part Four above, the development of self-concept and self-esteem is key to the construction of identity. Self-concept is fundamentally a social construct — the way one perceives oneself depends upon one's perceptions of the responses of others and the process of social interaction, and therefore upon one's relationships with others. Davis writes that '[p]eer relationships and the context in which they are experienced become central to the identity formation process during adolescence.'<sup>211</sup> Davis also notes, however, that positive relationships with parents also promote adolescents' identity development.<sup>212</sup> Autonomy refers to 'young people's ability to feel, think and act independently'.<sup>213</sup> Achieving the goal of autonomy involves individuation — a gradual moving away from dependencies upon parents towards 'more mature relationships', such as those with peers.<sup>214</sup> Clearly then the formation of new relationships and the changing nature of existing relationships are important facets of autonomy. The development of friendships, sexual relationships and support networks in general requires varying levels of intimacy.<sup>215</sup> Intimacy has been said to depend on self-disclosure.<sup>216</sup> Self-disclosure, in turn, has been defined as 'the act of revealing private information to others'.<sup>217</sup> Research has demonstrated that self-disclosures in friendships

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<sup>210</sup> See, eg, Peter and Valkenberg, above n 43. See also Subrahmanyam and Greenfield, above n 43, 124 drawing on John Hill's claim that adolescent behaviour is best understood in terms of the four key developmental tasks of adolescence: identity, autonomy, intimacy and sexuality.

<sup>211</sup> Katie Davis, 'Friendship 2.0: Adolescents' Experiences of Belonging and Self-Disclosure Online' (2012) 35 *Journal of Adolescence* 1527, 1528.

<sup>212</sup> Katie Davis, 'Young People's Digital Lives: The Impact of Interpersonal Relationships and Digital Media Use on Adolescents' Sense of Identity' (2013) 29 *Computers in Human Behaviour* 2281, 2282.

<sup>213</sup> Peter and Valkenberg, above n 43, 224.

<sup>214</sup> Ibid 225 citing Steinberg; Berk, above n 39, 619.

<sup>215</sup> Berk, above n 39, 620 (adolescents stress that intimacy is the most important characteristic of friendship) and 626 ('the achievement of intimacy in dating relationships lags behind that in friendships'); Daniel J Solove, 'Conceptualising Privacy' (2002) 90(1087) *California Law Review* 1087, 1121–2.

<sup>216</sup> Sabine Trepte and Leonard Reinecke, 'Preface' in Sabine Trepte and Leonard Reinecke (eds) *Privacy Online: Perspectives on Privacy and Self-Disclosure in the Social Web* (Springer, 2011) v; Berk, above n 39, 622–3; Duane Buhrmester and Karen Prager, 'Patterns and Functions of Self-Disclosure during Childhood and Adolescence' in K J Rotenberg and K J Rotenberg (eds), *Disclosure Processes in Children and Adolescents* (Cambridge University Press, 1995) 10–56.

<sup>217</sup> Krämer and Haferkamp, above n 162, 128, citing Asher.

precede self-disclosures to romantic partners and that development of intimacy in friendships may therefore serve to prepare young people for love relationships.<sup>218</sup>

The importance of positive relationships to all aspects of social and emotional development is fairly self-evident. Child development textbooks devote large sections to a discussion of the influences and centrality of family, peer and other relationships.<sup>219</sup> Asher and Parker argue that peer rejection has important implications for a child's social and emotional adjustment, both in the short and long term,<sup>220</sup> and peer rejection has been noted as a risk factor in suicide.<sup>221</sup> By contrast, strong friendships and social support networks may allow individuals to better cope with stresses<sup>222</sup> and generally contribute to positive mental health outcomes and general wellbeing.<sup>223</sup> Having supportive social relationships is also considered a protective factor against suicide.<sup>224</sup>

## B Relationships and Images

Self-presentation and impression management are considered fundamental to the construction and maintenance of personal relationships and to the smooth functioning of social interaction.<sup>225</sup> Images are one means by which impressions are created or upheld and have been described as a 'crucial tool' in online self-representation.<sup>226</sup> Images of oneself, of others or of places and things in one's life are all common forms of self-

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<sup>218</sup> Berk, above n 39, 624.

<sup>219</sup> See, eg, Feldman, above n 44; Ibid (Chapter on Family Relationships and Children's Stress Responses).

<sup>220</sup> Steven R Asher and Jeffrey G Parker, 'Significance of Peer Relationship Problems in Childhood', in Barry H Schneider et al (eds) *Social Competence in Developmental Perspective* (NATO ASI Series D: Behavioural and Social Sciences - Vol 51, Kluwer, 1989). See also Michelle F Wright and Yan Li, 'The Association Between Cyber Victimization and Subsequent Cyber Aggression: The Moderating Effect of Peer Rejection' (2013) 42(662) *Journal of Youth and Adolescence* 662, 663, citing research on peer rejection and noting that: 'When adolescents experience rejection by peers, they may repeatedly experience the negative attitudes of others over a long period of time'; Richman and Leary, above n 100, 376 referring to some of the consequences of rejection. See generally Prinstein and Aikins, above n 102.

<sup>221</sup> Government of Western Australia, above n 81, 28 (Table 3).

<sup>222</sup> Richard M Ryan and Edward L Deci, 'On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being' (2001) 521(1) *Annual Review of Psychology* 141, 154 (referring to research suggesting that having stable, satisfying relationships is a 'resilience factor across the lifespan' (references omitted)).

<sup>223</sup> Forest and Wood, above n 95, 295; Roy F Baumeister and Mark R Leary, 'The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation' (1995) 117(3) *Psychological Bulletin* 497; Patti M Valkenburg, Jochen Peter and Alexander Schouten, 'Friend Networking Sites and Their Relationship to Adolescents' Well-Being and Social Self-Esteem' (2006) 9(5) *Cyberpsychology and Behavior* 584, 589.

<sup>224</sup> Government of Western Australia, above n 81, 28 (Table 3).

<sup>225</sup> Feng-Yang Kuo et al, 'A Study of Social Information Control Affordances and Gender Difference in Facebook Self-Presentation' (2013) 16(9) *Cyberpsychology, Behavior, and Social Networking* 635, 636 ('In everyday life, the management of social image is important for people to maintain social relationships'); Leary and Kowalski, above n 49, 35 (referring to Goffman who 'discussed the important of self-presentation for defining the individual's place in the social order, for setting the tone and direction of an interaction, and for facilitating the performance of role-governed behavior').

<sup>226</sup> Kapidzic, above n 106.



presentation.<sup>227</sup> It has also been suggested that posting images online can contribute to relationship maintenance<sup>228</sup> and are a means of connecting with one's offline social group.<sup>229</sup> Van Dijck has described digital images as a 'new currency for social interaction' and suggests that the circulation of such images between individuals and groups can 'establish and reconfirm bonds'.<sup>230</sup> However, as discussed above, the posting of images that involve a conflict between an individual's identity claims or a collision of the 'fronts' ordinarily presented to different audiences may entail social consequences. As Foddy and Finighan observed:

Even the most intimate of friends are happy to remain ignorant of some of each other's habits and thoughts; in some cases this may be essential if they are to continue to relate to each other comfortably. Thus, individuals will sometimes resist being 'told' certain things about others with whom they have to interact. Parents and teachers often prefer not to know about acts of deviance on the parts of their charges because this knowledge could force them to take actions that might conflict with other goals they may have.<sup>231</sup>

Visual images, as with other information, provide 'social cues'<sup>232</sup> and have been shown to bias the assessments of others.<sup>233</sup> Where an individual is not in control of the publication of images of themselves, that individual is also not in control of the impressions or cues given off by those images. In turn, this impact on the way that individual is judged by others; on the social value that an individual perceives they have; as well as on an individual's *actual* social value. Pozzi observed that

many online relationships are anchored offline. In this respect, due to the anchoring of online relationships to the offline, it becomes important to maintain synergy across whatever identity claims are being made and maintain a consistent identity performance across mediums.<sup>234</sup>

In line with Pozzi's observations, Marder et al found that when users of social networking sites believe that they are not appearing as they ought to be, there is the potential for

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<sup>227</sup> Nancy Van House and Morgan Ames, 'The Social Life of Cameraphone Images' (*Proceedings of the Pervasive Image Capture and Sharing: New Social Practices and Implications for Technology Workshop (PICS 2005) at the Seventh International Conference on Ubiquitous Computing (UbiComp 2005) Tokyo, 2005*) 7. See also Barbara Harrison, 'Photographic Visions and Narrative Inquiry' (2002) 12(1) *Narrative Inquiry* 87, 107 who observes that self-presentation has become a major function of photographs.

<sup>228</sup> Stefanone, Lakoff and Rosen, above n 66, 42. Van House and Ames, above n 227, 6.

<sup>229</sup> Young, above n 144, 13.

<sup>230</sup> José Van Dijck, 'Digital Photography: Communication, Identity, Memory' (2008) 7(1) *Visual Communication* 57, 62.

<sup>231</sup> Foddy and Finighan, above n 60, 9.

<sup>232</sup> Mehdizadeh, above n 53, 340.

<sup>233</sup> Walther, Slovacek and Tidwell, above n 144, 126.

<sup>234</sup> Megan Pozzi, *All the World Wide Web's a Stage: Teenage Girls' Self-Presentation and Identities Formation through Status Updates* (Masters Thesis, Queensland University of Technology, 2014) 115.

'relational tension and anxiety in social networks'.<sup>235</sup> In terms of parental relationships, research has shown that adolescents who experience trusting relationships with parents are more likely to commit to a particular identity choice, which, in turn, enhances self-worth and social validation.<sup>236</sup> Accordingly, the publication of an image of an adolescent that conflicts with that adolescent's identity claims vis-a-vis their parents may endanger that level of trust and hence the relationship itself. This is significant even if the damage to the parental relationship is short-lived, given that positive parental relationships have been shown to impact the quality of adolescents' friendships.<sup>237</sup> In terms of peer relationships, Davis refers to the fact that during their peer interactions, adolescents 'develop and reinforce shared norms, such as distinct language use, clothing style, music preferences', which they use as 'identity markers' and to reinforce a sense of belonging with those who share their interests and values.<sup>238</sup> Accordingly, the publication of an image of an adolescent that does not conform to one or more of those norms might negatively impact upon that shared sense of belonging.

A striking example of the impact that a video can have on an individual's relationships and social networks is that of Amanda Todd. Amanda Todd was a Canadian teenager who took her life at the age of 15.<sup>239</sup> In a video recorded shortly before her death and using a series of hand-written messages to tell her story (see Figure 2 for an example), Amanda explained that in seventh grade she and her friend would use a webcam to meet and talk to new people.



**Figure 2: Still image from Amanda Todd's YouTube video<sup>240</sup>**

<sup>235</sup> Ben Marder, Adam Joinson and Avi Shanker, 'Every Post You Make, Every Pic You Take, I'll be Watching You: Behind Social Spheres on Facebook' Paper presented at 2012 45<sup>th</sup> Hawaii International Conference on System Sciences 859, 865.

<sup>236</sup> Wim Meeus, Annerieke Oosterwegel and Wilma Vollbergh, 'Parental and Peer Attachment and Identity Development in Adolescence' (2002) 25 *Journal of Adolescence* 93, 102.

<sup>237</sup> Katie Davis, 'Young People's Digital Lives: The Impact of Interpersonal Relationships and Digital Media Use on Adolescents' Sense of Identity' (2013) 29 *Computers in Human Behaviour* 2281, 2282.

<sup>238</sup> Katie Davis, 'Friendship 2.0: Adolescents' Experiences of Belonging and Self-Disclosure Online' (2012) 35 *Journal of Adolescence* 1527, 1528.

<sup>239</sup> 'Man Charged in Netherlands in Amanda Todd Suicide Case', *Europe, BBC News* (online), 18 April 2014 <<http://www.bbc.com/news/world-europe-27076991>>.

<sup>240</sup> Amanda Todd, above n 207.

Amanda was persuaded to expose her breasts online to a man she had never met in person. That stranger captured a photograph of her and threatened to show it to people she knew. Amanda describes how she received a message on Facebook from the stranger saying 'if you don't put on a show for me I will send your boobs'. She also explains that the man 'knew my address, school, relatives, friends, family names'. One year, during Christmas break, Amanda received a knock on the door at 4am from the police informing her that her photograph had been sent to everyone. As a result Amanda developed anxiety, depression and a panic disorder and got involved in drugs and alcohol. She moved school but the stranger managed to track her down and find out the names of her new friends. He made a Facebook page using the photo of her breasts as her profile picture. Amanda tells how she then lost all of her friends 'again' and that nobody liked her, judged her and called her names. Later Amanda was attacked outside school and the attack was filmed and posted on Facebook. Following the attack, Amanda attempted suicide but was taken to hospital and recovered. Despite moving schools yet again, Amanda tells that she continued to be bullied online. She ends the video 'I'm stuck ... whats left of me now ... nothing stops. I have nobody ... I need someone.'<sup>241</sup> Just over four weeks after posting the video Amanda was found dead.<sup>242</sup>

Another example of the impact that the posting of images online can have on an individual's relationships is that of Ghyslain Raza who, as a 14-year-old, made a video of himself 'clumsily' imitating a Star Wars Jedi Knight.<sup>243</sup> The video was posted onto the internet by his classmates, without Ghyslain's knowledge, and was consequently viewed by tens of millions of viewers.<sup>244</sup> The consequences for Ghyslain were severe — he was subjected to bullying and harassment and states that he 'lost what few friends he had in the fallout'.<sup>245</sup> Kowalski et al write that Ghyslain was forced to change schools and required psychiatric help.<sup>246</sup>

Although these examples are extreme, involving as they do harassment and bullying, the publication or dissemination of images may have a more 'subtle' effect on an individual's social standing and, thus, upon their friendships and social support networks. As discussed above, the posting of images may act back upon an individual's self-esteem because of an individual's own self-judgement. Poor self-esteem can ultimately have consequences for social relationships. This is not least because, as already noted, low self-esteem individuals may be less socially confident than high self-esteem individuals and may find it more

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<sup>241</sup> Ibid (quoted as written).

<sup>242</sup> 'Amanda Todd: Memorial for Teenage Cyberbullying Victim', *Health, BBC Newsbeat* (17 October 2012) <<http://www.bbc.co.uk/newsbeat/19960162>>.

<sup>243</sup> Maclean's, 'Star Wars Kid' Speaks Out, 10 Years Later (2013) <<http://www2.macleans.ca/2013/05/09/10-years-later-the-star-wars-kid-speaks-out/>>.

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> Kowalski, Limber and Agatston, above n 11, 11.

difficult to construct and maintain friendships and positive relationships.<sup>247</sup> Moreover, as discussed in Part Four above, lower self-esteem individuals might be less motivated to engage in techniques that create favourable self-impressions, even in response to unfavourable impressions.

### C *Summary of this Part*

Because impression management is fundamental to the creation and maintenance of relationships, and visual images are one way in which impressions are managed, the online publication of an unwanted image — particularly where it conflicts with an individual's identity claims — can negatively affect an individual's relationships. The effect on relationships can be more or less direct. It is more direct when an image causes individuals to form an unfavourable impression of the image subject, and perhaps act on that impression by responding in a certain way towards the image subject (such as by excluding them from certain social events). It is less direct when the publication of an image causes the image subject to experience low self-esteem, which, in turn, acts back on their ability to form and maintain relationships and on their sense of belonging. These effects, in turn, pose a risk to optimal development. This is because of the centrality of relationships to the goals of adolescence — namely identity formation, autonomy, intimacy and the development of the sexual self — and the fact that supportive relationships are also an important determinant of wellbeing.

## VI CAN THE UNWANTED ONLINE PUBLICATION OF IMAGES HAVE A POSITIVE IMPACT ON DEVELOPMENT?

Thus far it has been argued that the unwanted online publication of images of children and young people may have detrimental consequences for development by lowering self-esteem or impacting on an individual's relationships. However, might it be argued that the unwanted online posting of an image can actually have *positive* developmental implications? For example, where an image reveals a person engaged in antisocial or 'norm-violating' behaviour or underage drinking, it is arguable that the revelation of that behaviour, while unwanted by the person in question, could lead to interventions (by parents or others) that could in fact be ultimately beneficial to the image subject. Perhaps the revelation might lead to self-reflection and, ultimately, self-motivated behaviour change? Stern describes situations in which the reactions of visitors to online presentations of oneself instigated a change in self-concept, self-presentation and ultimately (in some cases) the author's offline behaviour.<sup>248</sup> Indeed, social interaction theory would suggest that public behaviour and public evaluation may have a greater

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<sup>247</sup> Forest and Wood, above n 95, 295; MacDonald and Leary, above n 64, 365.

<sup>248</sup> Stern, above n 53, 100. Although Stern's observations are made only in the context of publications instigated by the author, there is equal reason to suppose that the reactions to publications concerning but not instigated by the author would also exert an influence.

impact on self-concept change (leading in some cases to behaviour change) than private behaviour.<sup>249</sup>

It could, moreover, be argued that the posting of 'unflattering' photographs might serve as an antidote to narcissistic tendencies,<sup>250</sup> or perhaps encourage resilience<sup>251</sup> and assist individuals to develop strength of character. These may also be outcomes where embarrassing or humiliating photographs are posted.<sup>252</sup> Moreover, there are those who have suggested that an exaggerated sense of competence (that is, where a person's sense of their accomplishments or competence in a particular domain does not in fact match their level of competence in a particular area) may well lead to high self-esteem but can have other less positive outcomes.<sup>253</sup> Perhaps, then, this is a reason to argue that challenging an individual's false or exaggerated identity claims through the publication of images that introduce a 'dose of reality' is in fact a useful way of encouraging a more realistic perception of self. Furthermore, there are those who would challenge the underlying assumption that high levels of self-esteem are necessarily a good thing: Tennen and Affleck, for example, have suggested that individuals high in self-esteem may

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<sup>249</sup> See generally, Dianne M Tice, 'Self-Concept Change and Self-Presentation: The Looking Glass Self Is Also A Magnifying Glass' (1992) 63(3) *Journal of Personality and Social Psychology* 435.

<sup>250</sup> Mehdizadeh describes narcissism as 'a pervasive pattern of grandiosity, need for admiration, and an exaggerated sense of self-importance' (citing) and writes that 'narcissists do not focus on interpersonal intimacy, warmth, or other positive aspects of relational outcomes': Mehdizadeh, above n 53, 358. Carpenter refers to Raskin and Terry's conceptualisation of narcissism, which included three different traits: 'a grandiose sense of self-importance or uniqueness', 'inability to tolerate criticism' and 'entitlement or the expectation of special favours without assuming reciprocal responsibilities': Christopher Carpenter, 'Narcissism on Facebook: Self-Promotional and Anti-Social Behavior' (2012) 52 *Personality and Individual Differences* 482, 482. However, Carpenter also notes research by Ackerman et al, which suggests that the one aspect of narcissism is associated with leadership ability and that this aspect is therefore pro-social rather than anti-social: Carpenter at 483.

<sup>251</sup> For example, Professor Matt Sanders, Professor of Clinical Psychology at the University of Queensland and Director of the Parenting and Family Support Centre, has suggested that good natured and light-hearted teasing can 'build resilience, and can even be part of healthy friendships, where everyone knows they are not perfect': Matt Sanders, *Teasing or Bullying – Can You (Or Your Kids) Tell the Difference?*, Triple P Parenting Programs, Parents' Stay Positive! (17 February 2016) <<http://www.triplep-parenting.net.au/au-uk/en/read-that-blog/post/teasing-or-bullying-can-you-and-your-kids-tell-the-difference/>>.

<sup>252</sup> For example, Ghyslain Raza, who was subjected to severe bullying and experienced severe mental health problems following the online release without his knowledge or consent of a video of him, following which he became known as the 'Star Wars Kid', when asked whether he would change the past, replied 'No, I wouldn't change a thing, because today I'm happy with who I am ... I'm the product of good and bad experiences': Neetzan Zimmerman, "'Star Wars Kid' Breaks Silence, Says Online Fame Made Him Suicidal' *Gawker* (5 October 2013) <<http://gawker.com/star-wars-kid-breaks-silence-says-online-fame-made-h-499800192>>. Nevertheless, the episode and subsequent bullying did cause him to feel suicidal.

<sup>253</sup> See, eg, Rebecca P Ang and Nordalin Yusof, 'The Relationship Between Aggression, Narcissism, and Self-Esteem in Asian Children and Adolescents' (2005) 24(2) *Current Psychology* 113, 114 referring to research findings that an 'unrealistic and inflated view of one's competence and support, is a liability rather than an asset because it may reflect distorted social reasoning processes that interfere with the ability to learn from past experiences or the motivation to change maladaptive behaviour' and can 'increase the risk status for aggressive children'.

derogate others and engage in generally 'maladaptive behaviour' in order to enhance their high self-esteem.<sup>254</sup>

While these arguments are valid, a number of points can be made in response. Although the publication of an image of underage drinking or involvement in a fight may ultimately have positive consequences for behaviour change (such as where it leads to a successful intervention), there are potentially ongoing negative consequences for the image subject even after behaviour change has occurred. Firstly, it is important to remember that the affordances of the internet mean that images can remain online and searchable indefinitely. Solove opens his book *The Future of Reputation: Gossip, Rumour and Privacy on the Internet* with the true story of a young Korean woman who became widely known as 'dog poop girl' when she refused to clean up after her dog that had defecated on a subway train in South Korea. Solove explains that someone took a photograph of the girl and posted it online, at which point things got 'even uglier'.<sup>255</sup> Solove goes on to quote directly from a blog published by Don Park, explaining what happened next:

Within hours, she was labelled *gac-ttong-nyue* (dog shit girl) and her pictures and parodies were everywhere. Within days, her identity and her past were revealed. Requests for information about her parents and relatives started popping up and people started to recognise her by the dog and the bag she was carrying as well as her watch, clearly visible in the original picture. All mentions of privacy invasion were shouted down ... The common excuse for their behaviour was that the girl doesn't deserve privacy.<sup>256</sup>

Solove goes on to express his disagreement with the views of one commentator that the dog poop girl would 'be forgotten by the end of the season', writing as follows:

But this comment is inaccurate. She will not be forgotten. That's what the Internet changes. Whereas before the girl would have been remembered merely by a few as just some woman who wouldn't clean up dog poop, now her image and identity are eternally preserved in electrons. Forever she will be the 'dog poop girl'; forever she will be captured in Google's unforgiving memory; and forever, she will be in the digital doghouse for being rude and inconsiderate.<sup>257</sup>

Mayer-Schönberger suggests that the 'perfect memory' of the internet in fact impedes the ability of individuals to change and that 'by recalling forever each of our errors and transgressions, digital memory rejects our capacity to learn from them, to grow and to evolve'.<sup>258</sup>

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<sup>254</sup> Howard Tennen and Glen Affleck, 'The Puzzles of Self-Esteem: A Clinical Perspective' in in (ed) Roy F Baumeister *Self-Esteem: The Puzzle of Low Self-Regard* (1993, Plenum) 241, 256.

<sup>255</sup> Daniel Solove, *The Future of Reputation: Gossip, Rumour and Privacy on the Internet* (Yale University Press, 2007) 1.

<sup>256</sup> Ibid (quoting a blog by Don Park).

<sup>257</sup> Ibid 8.

<sup>258</sup> Mayer-Schönberger, above n 159, 125.

In this sense, forgetfulness is seen as fundamental to the development of self and identity, as well as to the capacity of individuals to make effective decisions. Being perpetually confronted with things from their past that they would otherwise, naturally, have forgotten or assimilated in time will, it has been suggested, make it difficult for individuals to live and act in the present 'cognizant of, but not shackled by, past events'. This perspective focusses then not only on the future impact of persistent digital memory but on present consequences of that persistence.<sup>259</sup>

Additionally, where an image depicts antisocial or norm-violating behaviour, the response to that image may involve a degree of disapprobation that, while it might succeed in bringing about behaviour change in the individual concerned, might also be excessive. As Solove has pointed out, '[h]aving a permanent record of norm violations is upping the sanction to a whole new level.'<sup>260</sup> An example of this is seen in the story of the dog poop girl, referred to above. Another example is to be found in the story of the 'cat bin woman'. The UK Guardian reported on this story in 2010:

One inexplicable moment of cruelty when Mary Bale seized a cat and dropped it into a wheelie bin was punished with a modest £250 fine ... But the 45-year-old former bank worker may pay the price for her impulsive act for the rest of her life.

The 'cat bin woman' from Coventry became reviled around the world, receiving abusive phone calls and death threats from as far afield as Australia, after what she described as a 'split second of misjudgement' — which was captured on CCTV and uploaded to YouTube.<sup>261</sup>

Although Solove relates the degree of disapprobation to the permanence of the record, the degree of disapprobation should be considered also by the extent to which the information is disseminated, as well as to other attributes of information online — namely that it might remain searchable and linkable to other information about the individual concerned. This is concerning when others base important decisions affecting the individual on information obtained from an online search. Hammer's doctoral research, for example, found that images posted on social media with an emphasis on drinking alcohol had a negative effect on the way potential employers perceived of the image subject as a potential employee.<sup>262</sup> In *Google*, the European Court of Justice commented on the potential for search engines to interfere with an individual's right to privacy and the protection of their data. In the Court's view, the inclusion of links in a search page following a search against that individual's name constituted a serious invasion of that

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<sup>259</sup> Anna Bunn, 'The Curious Case of the Right to be Forgotten' (2015) *Computer Law & Security Review* (quoting Mayer- Schönberger (12)).

<sup>260</sup> Daniel Solove, above n 255, 6.

<sup>261</sup> Patrick Barkham, 'Cat bin woman Mary Bale fined pounds 250' *The Guardian* (online) 20 October 2010 <<http://www.theguardian.com/world/2010/oct/19/cat-bin-woman-mary-bale>>.

<sup>262</sup> Hammer, above n 157, 69.

individual's right to privacy and data protection because it allowed internet users to obtain, through the list of results,

a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him.<sup>263</sup>

Against arguments that the posting of 'unflattering' photographs might serve as an antidote to narcissistic tendencies, or perhaps encourage resilience and develop strength of character, research suggests that people with a narcissistic personality generally exhibit reasonably high self-esteem. Therefore, while images that challenge the way in which narcissistic individuals perceive themselves *may* have an impact on their self-esteem, the impact is unlikely to reduce what is an overall level of high self-esteem to an overall low level of self-esteem.<sup>264</sup> Conversely, those individuals who exhibit low self-esteem are generally more vulnerable to further 'attacks' on their self-worth. This is because, as discussed above, low levels of self-esteem correlate with lower levels of resilience and higher levels of depression.<sup>265</sup> The already low self-esteem individuals are, then, at risk of serious negative outcomes where unflattering or embarrassing images are posted online and may be less likely to demonstrate resilience in the face of such attacks.

Moreover, although it may be considered 'fair game' to challenge a person's identity claims when those claims are exaggerated or false, it should be remembered that virtually everyone presents different 'fronts' to different 'audiences'. Indeed, the presentation of different 'selves' or 'fronts' is generally considered necessary for smooth social interaction and therefore to relationships.<sup>266</sup> As also noted in Part Four above, the ability to determine boundaries is also vital to self-definition. Given that the internet is a space where the usual boundaries between otherwise discrete audiences are often not in place, the consequences of posting an image that challenges the front a person usually presents to a particular audience can be devastating. An example of this collision of fronts occurred in the Amanda Todd case referred to previously, where images meant for one audience (a single individual) were presented to various audiences; Amanda's intimate photograph was made available to members of her family and school community.

Further, it must be recalled that the issue is the online posting of images of children and adolescents. While there is fierce debate over whether and to what extent self-esteem is

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<sup>263</sup> *Google*, (Case C-131/12, 13 May 2014) [2014] QB 1022 (European Court of Justice) 1074 [80].

<sup>264</sup> This is in part because self-esteem is generally thought to be a relatively stable construct — although it is possible that sustained negative feedback/responses will over time impact on one's self-esteem: Harter, above n 209.

<sup>265</sup> Kowalski, Limber and Agatston, above n 11, 85.

<sup>266</sup> See above, Part Five, Section B and see, esp, n 225.



a relatively stable construct throughout adult life,<sup>267</sup> there is wide acceptance of the fact that childhood, and adolescence in particular, is considered a crucial time for the development of self-esteem.<sup>268</sup> Harter notes that evidence reveals that self-evaluative judgements tend to become less positive as children move into middle childhood and that there is a further decline during early adolescence and gradual gains over the high school years.<sup>269</sup> Harter notes that developmentally, and in accordance with the 'looking-glass-self formulation', children tend to 'adopt about themselves the views of significant others but then gradually internalise these attitudes of others towards the self.'<sup>270</sup> Once attitudes of others have been internalised, Harter and Whitesell argue, young people may become less preoccupied with what others, particularly their peers, think of them.<sup>271</sup> However, Harter and Whitesell note that individuals appear to progress at different rates towards the 'goal' of internalisation<sup>272</sup> and conclude that those individuals who remain more preoccupied with the opinions of others generally report less concentration on schoolwork, lower overall self-esteem and less peer approval than do those who have internalised a 'generalised other' sense of self.<sup>273</sup> Arguably, then, those individuals may be more vulnerable, in terms of self-esteem levels, to 'compromising', 'unfavourable' or 'embarrassing' material posted online than those who have already internalised a generalised other. Given that childhood and adolescence is a period during which the process of internalisation of the attitudes of others towards them takes place, the importance of generally positive feedback in order to develop high self-esteem cannot be overstated. In other words, given that childhood and adolescence is a time when the self-concept and self-esteem are vulnerable and more likely to be moulded by the reaction of significant others, it is important to healthy development that events do not encourage children to internalise negative responses.

The impact of online publication of images on self-esteem and a sense of autonomy is compounded by affordances of the internet such that, as already discussed, information may be available permanently, may be widely disseminated and can potentially be searched and linked to other information. As was mentioned in Chapter One, concerns about the online posting of images may be accentuated by the development of face recognition search engines and the linking or tagging of images with names and other data about the image subject.<sup>274</sup> Langos has referred to a number of factors likely to exacerbate

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<sup>267</sup> Harter and Whitesell, above n 64, 1029.

<sup>268</sup> Virgil Zeigler-Hill, 'The Importance of Self-Esteem' in Virgil Zeigler-Hill (ed) *Self-Esteem* (Taylor and Francis, 2013) 1, 13; Unni K Moksnes et al, 'The Association Between Stress and Emotional States in Adolescents: The Role of Gender and Self-Esteem' (2010) 49 *Personality and Individual Differences* 430, 430–1, 434; Harter, above n 64, 106. Cf Boden, Fergusson and Horwood, above n 76.

<sup>269</sup> Harter and Whitesell, above n 64, 1029–30.

<sup>270</sup> Ibid 1046.

<sup>271</sup> Ibid 1046.

<sup>272</sup> Ibid.

<sup>273</sup> Ibid.

<sup>274</sup> Law Commission (New Zealand), *Privacy: Concepts and Issues, Review of the Law of Privacy Stage 1*, Study Paper 19 (2008), 133 [6.40].

the harm experienced in relation to cyberbullying,<sup>275</sup> some of which arguably apply to the harm experienced in relation to the online posting of images even where that would not constitute ‘cyberbullying’. One of these factors is the spatial distance between the “cyber world” and the “real world” whereby ‘[a] perpetrator, who is sheltered from the visual or aural response of their victim by the presence of the screen, is less likely to be affected by feelings of empathy.’<sup>276</sup> Thus, in the context of the posting of images, a person sheltered from the immediate responses of the image subject may think less about the consequences for that image subject (where these might otherwise be apparent). Another factor is the ‘anonymity’ of the perpetrator.<sup>277</sup> According to Langos, the perceived anonymity of a perpetrator can ‘exacerbate the power imbalance between the perpetrator and the victim. A victim may experience fear and insecurity as a result of not knowing the identity of the perpetrator. A victim may feel frustrated and powerless.’<sup>278</sup> Where the person posting an unwanted image is anonymous, this is likely to compound any sense on the part of an image subject that they have lost autonomy in the sense of being able to control access to themselves. Victims may experience feelings of ‘distrust and despair’ due to not knowing from whom or where their torment originates.<sup>279</sup>

It is also necessary to consider that there is very little empirical evidence of the long-term effects on development of the online publication of personal information, including images. The lack of knowledge is a reason to be cautious, at best, in suggesting that the online publication of unwanted images can have a positive impact on the image subject’s development. Nevertheless, it is also important to recognise that there are many positive developmental implications for children in capturing and sharing images of others and being active participants in using technology, including the internet and social media platforms.<sup>280</sup> The practice of capturing and sharing images of others is also an instance of freedom of expression. As will be noted in Chapter Five, freedom of expression is a civil right that, along with others, is considered ‘fundamental to guaranteeing the right to health and development of adolescents.’<sup>281</sup> Therefore, any response to the issue of unwanted publication needs to consider the overall effect on the interests, rights and freedoms of others.

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<sup>275</sup> Langos, above n 2, 126–32.

<sup>276</sup> Ibid 127.

<sup>277</sup> Ibid 128.

<sup>278</sup> Ibid 129 (references omitted).

<sup>279</sup> Kathleen Conn, ‘Cyberbullying in American Higher Education: Litigation Challenges and Recommendations’ (2013) 18(1) *International Journal of Law & Education* 21, 23.

<sup>280</sup> See, eg, Teresa Swist et al, ‘Social Media and the Wellbeing of Children and Young People: A Literature Review’ (Report, Commissioner for Children and Young People, Western Australia, July 2015) 5; Australian Human Rights Commission, *Children’s Rights Report 2014*, National Children’s Commissioner, 17; Aspen Institute Task Force on Learning and the Internet, *Learner at the Center of a Networked World* (2014) 72.

<sup>281</sup> Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 33<sup>rd</sup> session, UN Doc CRC/GC/2003/4 (1 July 2003) 3 [10].

## VII 9CHAPTER SUMMARY AND CONCLUSIONS

This chapter began by noting the gaps in the literature regarding the implications for development of the unwanted online publication or distribution of an image of a child or young person. The use of images to perpetrate bullying or victimisation has been widely noted, and has even been described as a particularly ‘impactful’ form of bullying or victimisation. While there is fairly extensive research on the developmental implications of bullying and victimisation for victims in general, that research rarely delves into the reasons why the publication and distribution of images as a form of bullying or victimisation has such impact. This chapter has added to that limited research by suggesting that the online publication or sharing of images within a cyberbullying context (as well as other contexts) is so impactful due to an inherent desire on the part of individuals to create favourable impressions and the fact that the unwanted publication or use of an image impacts directly and indirectly on an individual’s self-esteem and on their relationships with and sense of connection to others.

After establishing the scope and framework of the research in this chapter in Part Three, Part Four then considered the centrality of self-esteem to the development of identity. Literature on the link between self-esteem and appearance was referred to. It was noted that when a person receives negative feedback or a negative response to their appearance in an image, this may have a detrimental impact on that individual’s self-esteem. It was also noted that an individual’s self-esteem can be negatively impacted not because of the way in which others actually respond to the individual, but because of the individual’s perception of how others might see them.

Moving beyond the link between self-esteem and appearance, literature on the centrality of impression management or self-presentation to the development of positive self-esteem was discussed. It was noted that individuals generally aim to create favourable (although not necessarily unrealistic) impressions of themselves, as well as impressions that are consistent with their various identity claims. The phenomenon of context collapse was discussed and it was seen that this phenomenon can make it more difficult for an individual to manage impressions of themselves in an online environment. Context collapse is the term given to the fact that in the online environment, particularly in the context of social media, discrete audiences are often merged so that information is ‘pushed’ to all those with access to the online material, even if it was intended for a particular group. Thus information or images that may be considered appropriate amongst friends may not be considered appropriate when seen by family members, work colleagues or professional contacts. An individual’s self-esteem can be lowered if they have created an unfavourable impression of themselves vis-a-vis a particular audience, or even if they believe they have done so.

The literature on self-esteem and impression management tends to support both of the propositions advanced at the beginning of this chapter in relation to the unwanted online publication and distribution of images. The first proposition was that the detrimental effect on development can occur even where the publication or sharing of an image is not ill-intentioned. This proposition is supported by the research demonstrating that an image subject's self-esteem is influenced by self-judgement. A person can form a negative self-judgement if they believe an image depicting them is unflattering or unfavourable — this might be a purely subjective belief and not actually shared by others (including the person publishing or sharing the image). It is worth recalling here Charon's observations that even when others actually like us, we may misinterpret their actions towards us as negative (or vice versa).<sup>282</sup> The second proposition was that detriment can occur regardless of whether or not the image can be described, objectively, as harmful. Clearly, given that an image subject's subjective response to how they come across (or how they believe they come across) to others can impact upon their self-esteem, even a 'benign' or 'anodyne' image can harm self-esteem. This is not to say that ill-intentioned behaviour on the part of the person publishing or sharing an image of another is irrelevant in terms of the impact on another's self-esteem. Neither is it to say that the nature of the image is irrelevant. Clearly where others intend to harm or embarrass an individual, or where an image is likely to have that effect, this is all likely to act upon that individual's self-judgement.

Part Four also explained the link between self-esteem and autonomy. It was noted that an individual's self-esteem can be affected by the extent to which they are able to control the presentation of self and regulate interpersonal boundaries. The impact on autonomy is quite apart from any consequences that might ensue from the publication or distribution of an image, or from any impact on self-esteem related to a person's self-judgement in relation to the image in question. The link between autonomy and self-esteem also supports the two propositions advanced in the chapter. An individual's sense of control over how they are represented visually is potentially compromised whenever others make decisions about how that individual is represented, such as by taking and publishing or sharing images of the image subject, or when the individual has no capacity to remove an image from publication or prevent it from being shared. An individual may experience a lack of control even when others are well-intentioned in their decision to post or share images of that individual, or when the images are not inherently embarrassing, harmful and so on.

Part Five of this chapter discussed the importance of positive relationships to development. It was argued here that the online publication or use of an image without the image subject's consent — particularly where that image conflicts with an individual's identity claims — can negatively affect an individual's relationships. The effect on relationships can be ascribed to the fact that the image causes others to form an

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<sup>282</sup> Charon, above n 60, 84.

unfavourable impression of the image subject. Those individuals might, in turn, react towards the image subject (such as by excluding them from certain social events) in a way that impacts upon the image subject's sense of belonging and feelings of relatedness with others. However, the effect on the image subject's relationships can also occur more indirectly: the publication of images (for reasons discussed in Part Four) can impact upon an individual's self-esteem, which, in turn, can impact on an individual's relationships and their sense of connection with others.

It should be clear that the link between relationships and the unwanted publication or use of images also supports both of the propositions that were advanced at the beginning of this chapter. It is not necessary for an individual to be motivated by ill-intent when publishing or sharing an image of another for that image to adversely impact on another's relationships. For example, a person may post to a social media page a photograph of a female school friend, at a party, sitting on a boy's knee. The publication of the photograph on Facebook may simply be motivated by the photographer's desire to share images of the party (perhaps this enhances their own identity claims or sense of belonging). The person posting the picture might be unaware of the fact that the girl comes from a very strict religious family who take a strong view on physical contact between the opposite sexes. If the family are able to view the photograph this could pose a risk to the image subject's family or community relationships. As shown in Part Five, family relationships also impact upon peer relationships. This outcome, moreover, can occur even though the image would not be described, objectively, as embarrassing, intimate, harmful, and so forth.

Part Six considered whether there are positive developmental implications for children arising from the practice of the online publication of images, or sharing of online images. Overall it was argued that in relation to children who are image subjects the potentially harmful repercussions of the unwanted online publication or distribution of images can outweigh the potential benefits. This is, not least, because publication or distribution in the online environment can have unforeseeable or future consequences due to the affordances of the internet, such that information (and images) are storable, searchable and linkable with other information. The discussion in this chapter was intended to cover only some of the possible developmental implications relating to the issue of the way children are visually represented online by others. Given the paucity of research in this area, it is likely that there are other implications not explored here.

However, it also needs to be recognised that there are likely to be numerous positive developmental implications for children arising from the ability to capture, share and use images of others, including the development of social networks and self-identity. The capture, use and sharing of images of others by children is also a form of expression and it must be remembered that under the *CRC* children have a right to freedom of expression,

as well as a right to development.<sup>283</sup> These rights are elaborated further in Chapter Five. Moreover, a response that seeks to protect children against harm or the risk of harm does not necessarily, overall, promote optimal development. For example, a response that attempted to regulate children's access to the internet or social media as a way of protecting them against the risk of harm would compromise positive developmental processes, including identity formation, community building and creativity.<sup>284</sup> It would also compromise the development of 'digital age literacies', which encompass technical skills as well as 'competence in navigating the social nature of participatory media'.<sup>285</sup> Therefore, any legal response to the risks outlined in this chapter needs to take into account not only the efficacy of the response in addressing the risk of harm, but the implications of that response on positive developmental experiences as well as its impact on the various interests, rights and freedoms of others.

This chapter has not drawn any conclusions as to what if anything *should* be done to mitigate the risks outlined. The answer to that question depends in part on whether the risks are considered acceptable — part of the price of living in the digital age, perhaps. However, as is argued later in Chapter Five, Australian's commitment to the right of development — where development is interpreted holistically to include a child's physical, mental, spiritual, moral, psychological and social development<sup>286</sup> — suggests that these risks do need to be addressed where this is possible. This chapter has also not considered what *could* be done to mitigate those risks. Possible regulatory solutions to address these risks are discussed later in Chapter Six.

The risks identified in this chapter arise in part because children have little control over whether and how they are represented online. From a regulatory point of view there are few laws that prohibit the capture of an image of a child or young person, although the capture of images of children is prohibited in some limited circumstances.<sup>287</sup> Another factor that gives rise to the risks identified in this chapter is that children have little if any control over images once they have been published online, although this is not to say they have none. In particular, unless the image subject themselves has posted an image to their own social media page or to a web page that they control (and it has remained there and not been copied elsewhere) there are few options for removing the image. The purpose of the next chapter is to consider in detail the extent to which children do have 'control' over the capture of an image or over an image itself, once it has been published online.

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<sup>283</sup> CRC art 6(2) (right to development) and art 13 (right to freedom of expression).

<sup>284</sup> See, eg, Swist above n 280; Australian Human Rights Commission, above n 280.

<sup>285</sup> Aspen Institute Task Force above n 280.

<sup>286</sup> Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child*, 34<sup>th</sup> sess, UN Doc CRC/GC/2003/05 (27 November 2003) 4 [12].

<sup>287</sup> Which will be discussed in the following chapter.



## **CHAPTER THREE –REVIEW OF THE AUSTRALIAN LEGAL FRAMEWORK**

### **I INTRODUCTION**

This thesis is concerned with the unwanted online publication of images of children and young people, as well as the unwanted use of online images. The reason this issue is important is because, as was explained in Chapter Two, the online publication of images of children, or their subsequent use, can lead to developmental harm on the part of the image subject. That harm is more likely when images are initially published without the consent of the image subject, or where online images are further published in a way or context that is unwanted by the image subject.<sup>1</sup> Chapter Two argued that the nature of images combined with the affordances of the internet (not least the persistence and searchability of data once online) are such that an individual's self-esteem and relationships, and thus their development, can be detrimentally impacted by the presence of an image online. Despite this, children and young people have little control over how they are represented visually in the online environment. Subject to some exceptions, children are generally unable to prevent the capture of images of themselves and are also unable to prevent the publication of images, or secure their removal from publication. The factors that prevent children from being fully autonomous and deciding for themselves whether an image should be captured and whether and in what circumstances an image should be published are various, as are those that prevent children being able to remove unwanted images from online publication or prevent the subsequent use of an online image in a way that is unwanted. Some of these factors, explained in more detail in Chapter Five, include social norms around photography and the online publication of images of others; market factors (for example, social media sites actively encouraging individuals to share information and photographs about themselves and their friends); particular features of technology (for example, the ease by which images are able to be captured, copied and shared online); and the regulatory environment.

This thesis will develop the proposition that children need greater control over the online publication of images of themselves in order to protect them from the potential developmental harms outlined in Chapter Two. It will be argued in Chapter Five that regulation is an essential tool in providing children with greater control over images of themselves and that the current regulatory environment does not provide sufficient control. That argument rests, in turn, on the proposition that there are gaps in the current regulatory environment. It is the purpose of this chapter and the next to identify those gaps. This is done by first considering to what extent the current regulatory framework in Australia allows individuals to exercise a measure of 'control' over their image in the

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<sup>1</sup> See further Chapter Two, Part Four.



online environment. This chapter will therefore overview the limitations of various private law and criminal law actions in providing children and young people with ‘control’ over the capture, publication and use of their image. Those limitations will then be illustrated in the context of various hypothetical case studies set out in the following chapter.

In this chapter the word ‘control’ is used in a very broad sense to mean the availability of *some form of legal redress* with respect to the unwanted capture, publication or use of an image in which the individual is a subject. Redress can take many forms, of course. While it might allow an individual to secure removal of an image from publication, this is not a given. It is probably true to say that an individual who is denied the ability to secure removal of an image of themselves from unwanted publication is unlikely to regard any other form of redress as giving them a measure of ‘control’ over their image. However, as is discussed in Chapter Five, there is interdependence between social norms and the law.<sup>2</sup> Where social norms are developing rather than entrenched, as seems to be the case in the online context, law is an important factor in influencing what norms develop (just as norms and expectations have a more or less direct influence on law<sup>3</sup>).<sup>4</sup> As such, the availability of some form of redress vis-a-vis the capture, publication or use of an image is likely to be an important tool in shaping social norms, thereby, albeit indirectly, affecting the extent to which, in practice, children have control over the capture, publication and use of their image.

## II CHAPTER OUTLINE AND SCOPE

The discussion part of this chapter (Part Three) provides an overview of the various private law and criminal law actions that may provide redress to a person in relation to the unwanted capture, publication or use of an image. Following that, Part Four will offer a brief summary of the limitations of these actions in providing an individual with redress for the capture, publication or use of their image. The p

A description of the broad legal context is a necessary starting point because it is only when the limitations or shortcomings of the existing legal and regulatory framework are

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<sup>2</sup> Lawrence Lessig, *Code 2.0* (Basic Books, 2006) 124.

<sup>3</sup> A relevant example here is the reasonable expectations of privacy test: a ‘formula that features, either as the test, or as part of the test, of actionability in constitutional jurisprudence in the United States and Canada; in European human rights law; and in private law cases in England, New Zealand and the United States’: NSWLRC, *Invasion of Privacy*, Report No 120 (2009) 20 [5.4]. The reasonable expectations of privacy test has been described as ‘a reflection of contemporary societal values’ (*Hosking v Runting* [2005] 1 NZLR 1 [250] (Tipping J) (*Hosking*)), but also as a ‘normative judicial finding ... on ... the current demand for the legal protection of privacy and on whether the law ought to protect privacy in the particular circumstances’: NSWLRC at 21 [5.5]. Solove has argued that focusing only on people’s current expectations of (social norms around) privacy would, over time, erode the concept of privacy, given the level of surveillance which exists in the modern world: Daniel J Solove, ‘Conceptualising Privacy’ (2002) 90 *University of California Law Review* 1087, 1142.

<sup>4</sup> Indeed, when law mandates education in order to change social norms this is, as Lessig points out, an example of a legal constraint operating indirectly (rather than directly by way of a sanction-backed constraint on behaviour): Lessig, above n 2, 131.

clear that the need for new law can be assessed and any proposals for the introduction of new laws can be properly evaluated. However, some of detail of the causes of action or other means of redress considered here can only be truly appreciated when those laws are applied to specific fact scenarios. Furthermore, it is only in applying the legal framework to specific fact situations that some of the complexities and ‘grey areas’ are highlighted. Therefore, the following chapter (Chapter Four) will build upon the overview offered in this chapter by illustrating the application of some of the causes of action and regulatory regimes to various case studies.

The purpose of this chapter is not to make a judgement on the value of the claim to control, nor to consider the most *appropriate* remedies or forms of redress in relation to the unwanted publication or use of image, although this will be explored further in Chapter Six. This chapter also does not aim to describe every element of or every defence to the legal causes of action or criminal offences considered, nor every aspect of the legislation discussed. Rather, the aim is to highlight the limitations of current Australian law in providing individuals with redress in relation to the unwanted capture, publication or use of an image.

The regulatory framework itself is not, of course, determinative of how much control children actually have over images of themselves, and says nothing about how relatively easy or difficult it is to exercise control. To this end, other important considerations are the availability of non-legal mechanisms by which individuals might be able to control their image and also access to justice and the cross-jurisdictional enforceability of laws. In order to determine how much control children in particular have over images, it is also necessary to consider the ease or otherwise of procedures and processes by which children can avail themselves of protection and focus on the attitude adopted by the courts to claims before them.<sup>5</sup> Nevertheless, this chapter confines itself to an examination of the content and scope of the current Australian regulatory framework in providing individuals with control over the unauthorised publication or subsequent use of images of themselves.<sup>6</sup>

Although a broad range of legal actions are overviewed in this section, the aim is not to ‘cover the field’ and there may be some fact-specific situations that give rise to legal actions or remedies not mentioned here. For instance, where an image is captured and published by a media outlet, whether online or otherwise, that media outlet might be governed by industry standards such as those set by the Australian Press Council<sup>7</sup> or those

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<sup>5</sup> Such as whether the courts adopt what Tobin has described as a ‘substantive rights approach’ in relation to the rights of children: John Tobin, ‘Judging the Judges: Are they Adopting the Rights Approach in Matters Involving Children?’ (2009) 33 *Melbourne University Law Review* 579.

<sup>6</sup> The term ‘image’ as used in this chapter includes photographic, videographic or cinematographic images, no matter what format those images are captured or stored in, but does not include other forms of representations of likeness, such as portraiture, drawings, sculptures and so forth.

<sup>7</sup> Australian Press Council, *Statements of Principles* (2014) <<http://www.presscouncil.org.au/statements-of-principles/>> and *Specific Standards* <<http://www.presscouncil.org.au/specific-standards/>>. As to members

registered under the *Broadcasting Services Act 1992* (Cth) ('BSA').<sup>8</sup> The use of an image in an advertisement may contravene a provision of the Advertising Standard Bureau codes of ethics or practice guidelines. A consideration of those regulatory regimes is beyond the scope of this chapter, although the complaints mechanisms available under these codes may enable an aggrieved individual to successfully obtain redress in relation to the unauthorised publication or use of their image. However, three of the case studies discussed in the following chapter will make reference, where relevant, to other mechanisms of redress not discussed in this chapter. There may be scope, in some situations, for an image subject to argue that the unauthorised publication of their image constitutes a breach of a duty of care for the purposes of a negligence action.<sup>9</sup> Likewise, laws regulating individual behaviour in public places might, in certain circumstances, be invoked to provide a measure of privacy protection for individuals,<sup>10</sup> and where a criminal offence has been committed conspiracy offences may also be relevant. However, these actions are not considered in this chapter.

Although self-regulation on the part of internet intermediaries<sup>11</sup> is an important part of the regulatory environment, this section does not consider in any detail the various terms and conditions of internet content hosts<sup>12</sup> or internet service providers,<sup>13</sup> nor the industry codes to which they may be party. Nevertheless, several of the case studies in Chapter

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and constituent bodies of the Australian Press Council, see Australian Press Council, *Who we Are* <<http://www.presscouncil.org.au/who-we-are/>>.

<sup>8</sup> BSA s 123. For details of and links to Registered Codes and Schemes see Australian Communications and Media Authority ('ACMA'), *Register of Broadcasting Codes and Schemes Index* <<http://www.acma.gov.au/theACMA/About/The-ACMA-story/Regulating/broadcasting-codes-schemes-index-radio-content-regulation-i-acma>>.

<sup>9</sup> This was the contention made by the plaintiff in *Saad v Chubb Security Australia Pty Ltd* [2012] NSWSC 1183 (4 October 2012) ('*Saad*') in which the plaintiff pleaded causes of action in negligence and defamation (and later sought leave to amend it to include other causes of action, including breach of confidence and invasion of privacy). The court refused to strike out the negligence claim against the first defendant.

<sup>10</sup> For example, Department of Communications (Cth), Australian Government, *Enhancing Online Safety for Children: Public Consultation on Key Election Commitments* (2014) 11, which notes that 'issues relating to online content can be the basis for complaints to the Australian Human Rights Commission (AHRC) under federal anti-discrimination law (for example, online content that is alleged to constitute sexual harassment or racial hatred)'. See also *R v Rowe* [2005] 2 NZLR 833, a New Zealand case in which the appellant failed in his bid to have his conviction overturned for taking surreptitious photographs of schoolgirls walking to school under a section of the criminal law relating to behaving in an offensive manner in a public place. For further discussion of the case see, generally, Paul Roth, 'Unlawful Photography in Public Places: the New Zealand Position' (2006) 11(8) *Privacy Law and Policy Reporter* 213.

<sup>11</sup> The term 'internet intermediary' is used here in the same sense as it is used by the ALRC in its 2014 report, ALRC, *Serious Invasions of Privacy in the Digital Era*, Report no 123 (2014) 207 [11.100] and note 125: the ALRC notes that the term 'internet intermediary' is a broad one, 'commonly used to cover carriage service providers, such as Telstra or Optus; content hosts, such as Google or Yahoo!; and search service and application service providers, such as Facebook, Flickr and YouTube' referring to Peter Leonard, 'Safe Harbors in Choppy Waters – Building a Sensible Approach to Liability of Internet Intermediaries in Australia' (2010) 3 *Journal of International Media and Entertainment Law* 221, 226.

<sup>12</sup> As that term is defined in the *Broadcasting Standards Act 1992* (Cth) sch 5, cl 91(1)(b). See further the List of Defined Terms used in this thesis.

<sup>13</sup> As that term is defined in the *Broadcasting Standards Act 1992* (Cth) sch 5, cl 8. See further the List of Defined Terms used in this thesis.

Four do touch on some of these specific provisions and Part Three, section 13 below considers in a general sense the contractual force (if any) of the terms of service of certain social media providers. Finally, it should be noted that while the focus of this thesis is the online publication of images or their subsequent use, this chapter is not limited to considering laws that regulate only online publication or the use of online images. That is because, generally speaking — although with some exceptions that will be discussed in Part Three — such laws that do regulate the capture, publication and use of images are technology neutral.

### III DISCUSSION

This section begins in Part A by overviewing various private law causes of action that can be relied upon to remedy the unauthorised publication or use of images in some circumstances. It also considers the utility of contractual provisions and agreements between internet content hosts (specifically certain popular social media providers) and individuals, in so far as these may provide redress for the unwanted publication or use of an image. Part B provides an overview of the federal regime relating to information privacy, and the limitations of the *Privacy Act 1988* (Cth) in regulating the capture and use of images. Part C briefly outlines the recently introduced *Enhancing Online Safety for Children Act 2015* (Cth) and the complaints system introduced under that legislation, which is designed to allow, among other things, for the rapid removal from social media services of cyberbullying material targeted at an Australian child. Part D outlines the regulatory regime of the *BSA* in so far as it applies to online content, and Part E overviews criminal offences that may be applicable to the capture and use of images.

#### A Private Law Actions

##### 1 Common Law Action for Invasion of Privacy

The existence of a common law action for invasion of privacy has been recognised in Australia at a lower court level in the cases of *Grosse v Purvis*<sup>14</sup> and *Doe v Australian Broadcasting Corporation*.<sup>15</sup> Nevertheless, the question of whether individuals do have a cause of action for invasion of privacy in Australia cannot be answered definitively. The position in Australia as at 2009 was summarised by Davis J in *Chan v Sellwood* as follows:

Whether the law of Australia recognises a tort for breach of privacy is a little unclear. What the High Court said about it in *ABC v Lenah Game Meats Pty Ltd* would not appear to preclude the emergence of such a tort. In *Grosse v Purvis* (2003) Skoien J of the Queensland District Court found that there was such a tort. Heerey J in *Kalaba v Commonwealth* thought that the weight of authority was, at that time, against the

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<sup>14</sup> (2003) Aus Torts Reports ¶181-706 ('*Grosse*').

<sup>15</sup> [2007] VCC 281 (3 April 2007) ('*Doe v ABC*').

proposition that there was such a tort but in *Gee v Burger* McLaughlin AsJ thought that the matter was arguable.<sup>16</sup>

Since then there has been no recognition of a cause of action for invasion of privacy, but a number of courts have refused to rule out its existence.<sup>17</sup>

Uncertainty as to whether a tort of invasion of privacy exists at all in Australian law is the biggest barrier to a plaintiff wishing to bring an action for invasion of privacy in respect of the unauthorised publication or use of images of themselves. As the ALRC has observed in its most recent report on privacy, 'any significant development of the common law

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<sup>16</sup> *Chan v Sellwood* [2009] NSWSC 1335 (9 December 2009) [37] citing *Lenah* (2001) 208 CLR 199, *Grosse* (2003) Aus Torts Reports ¶81-706; *Kalaba v Commonwealth of Australia* [2004] FCA 763 (8 June 2004) and *Gee v Burger* [2009] NSWSC 149 (13 March 2009). See also *WBC v Chief Commissioner of Police (Vic)* [2012] VSCA 159 [81] (Warren CJ): the question of whether a right to privacy exists at common law, and if so its scope, is 'yet to be settled by the High Court or a superior court of record' (Hansen JA agreeing).

<sup>17</sup> See, eg, *Dye v Commonwealth* [2010] FCA 720: here the plaintiff sought to amend her statement of claim to include, among other things, an action for breach of privacy. Katzmann J noted (at [280]) that there were 'grave problems' with the privacy claim, not least the fact that the submissions seemed to 'conflate' the privacy claim with other claims, including for breach of confidence. However, Katzmann J accepted (at [290]) that it would not be appropriate to deny the plaintiff the opportunity to claim for breach of privacy on the basis of the current state of the law, although expressed some doubt as to whether the matters complained of would constitute an invasion of privacy. More recently in *P6Y4SX and Department of Police* [2012] QLCmr 9 the Queensland Information Commissioner observed (at [9]) that 'in Australia there is neither a constitutional right to privacy nor is there a generally recognised legal cause of action of 'unjustified invasion of privacy', although the possibility of one has not necessarily been excluded'. See also *Gee v Burger* [2009] NSWSC 149 (13 March 2009) where McLaughlin AJ suggested (at [53]-[55]) that a claim for invasion of privacy was arguable; and *Saad* [2012] NSWSC 1183 (4 October 2012) in which the plaintiff sought to amend her Statement of Claim, originally pleading causes of action in negligence and defamation, to include other causes of action, including breach of confidence and invasion of privacy. In allowing the Plaintiff to amend her Statement of Claim to include actions based on invasions of privacy interests, Hall J held, at [183], that: '[o]n balance, I have concluded that, having regard to the source of the photographic images, the limited purpose for which they were obtained and the nature of them, I do not consider that, at this stage of the proceedings, it is open to conclude that the cause of action based on invasion of the plaintiff's privacy would be futile or bad in law.' See also *Doe v Yahoo!7 Pty Ltd* [2013] QDC 181 (9 August 2013) in which the defendants sought to have the plaintiff's claims struck out. In refusing to strike out the claim for invasion of privacy, Smith DCJ concluded (at [310]-[311]) that: 'it seems to me that there is an arguable case on invasion of privacy. I would be very hesitant to strike out a cause of action where the law is developing or unclear. As noted there are two single judge decisions in Australia where the claim has been successful'. Cf *Maynes v Casey* [2011] NSWCA 156 (20 June 2011) [34], in which Basten JA (Allsop P concurring), referring to the cases of *Lenah* (2001) 208 CLR 199 and *Giller v Procopets* (2008) 24 VR 1 ('*Giller*'), commented that 'these cases may well lay the basis for development of liability for unjustified intrusion on personal privacy, whether or not involving breach of confidence: cf *John Fairfax Publications Pty Ltd v Hitchcock* [2007] NSWCA 364; 70 NSWLR 484 [124]', suggesting that while a cause of action may be developed it did not currently exist. See also *Sands v State of South Australia* [2013] SASC 44 (5 April 2013), in which Kelly J found, at [614], that: 'The ratio decidendi of the decision in *Lenah* is that it would require a further development in the law to acknowledge the existence of a tort of privacy in Australia. In my view, the statements of the majority in *Lenah* do not support the suggestion that the High Court in *Lenah* held out any invitation to intermediate courts in Australia to develop the tort of privacy as an actionable wrong'. In *Ghosh v Ninemsn Pty Ltd & Ors* [2013] NSWDC 63 (17 May 2013) the court considered that there was no recognised cause of action for breach of privacy in Australia.

would require litigants with the resources and determination both to initiate proceedings and to take those proceedings through the appeals process.<sup>18</sup> Further, it is noted that

[t]here are indications that litigants may prefer to rely on the limited remedies of well-established causes of action, rather than risk the prolonging of proceedings or appeals on uncertain points of law or novel arguments. This is particularly so if the monetary compensation for any new cause of action is not likely to be high.<sup>19</sup>

Even if the existence of a cause of action for invasion of privacy becomes established in the common law of Australia, however, its utility is likely to be limited by the difficulty for plaintiffs in proving all of its likely elements. Given that the common law in Australia does not definitely recognise a cause of action for invasion of privacy, the elements of any such action, should one be held to exist, remain unfixed. However, in line with developments thus far towards recognising such an action, the plaintiff would almost certainly have to establish that they had a reasonable expectation of privacy.<sup>20</sup> It is also possible that courts would recognise an action only in situations involving an intrusion into seclusion or the publication of private facts,<sup>21</sup> and indeed this seems likely in the face of judicial and

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<sup>18</sup> ALRC, *Serious Invasions of Privacy*, above n 11, 55 [3.56].

<sup>19</sup> *Ibid* 55 [3.57].

<sup>20</sup> See, eg, *Doe v ABC* [2007] VCC 281 (3 April 2007) [116] and [119] (Hampel J). See also *Saad* [2012] NSWSC 1183 (4 October 2012) [166] referring to submissions of Counsel for the Defendant at [58]. The concept of a reasonable expectation of privacy is familiar in many jurisdictions recognising a cause of action for invasion of privacy. The NSWLRC refers to it as a 'formula that features, either as the test, or as part of the test, of actionability in constitutional jurisprudence in the United States and Canada; in European human rights law; and in private law cases in England, New Zealand and the United States': NSWLRC, Report, above n 3, 20 [5.4].

<sup>21</sup> In its most recent report recommending the introduction of a statutory cause of action for invasions of privacy, the ALRC recommended that the action be available where a plaintiff is able to prove that their privacy was invaded in one of two ways: namely, by way of intrusion upon seclusion or the misuse of private information: ALRC, *Serious Invasions of Privacy*, above n 11, 73 [5.1]. The ALRC notes that: 'These two categories of invasion of privacy are widely considered to be the core of a right to privacy': ALRC, *Serious Invasions of Privacy*, above n 11, 73 [5.4]. Australian courts may similarly decide to confine an action for invasion of privacy to these two types of invasion (rather than invasions that place the plaintiff in a false light or involve the appropriation of image or likeness). According to the ALRC, intrusion upon seclusion 'will usually involve watching, listening to, or recording someone's private activities or private affairs. It can also involved unwanted intrusion into someone's private space': ALRC, *Serious Invasions of Privacy*, above n 11, 73 [5.2]. Misuse of private information, according to the ALRC, will 'usually involve collecting or disclosing someone's private information': ALRC, *Serious Invasions of Privacy*, above n 11, 73 [5.3]. In relation to intrusion upon seclusion, the ALRC links this to the first of Moreham's 'two overarching categories' of invasion of privacy, namely the 'unwanted watching, listening, recording and disseminating of recordings': ALRC, above n 11, 76 [5.14] referring to Nicole Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73(2) *Cambridge Law Journal* 350. A key to understanding Moreham's first category is the word 'unwanted' - unless the sensory access is unwanted, there has been no intrusion: Nicole Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73(2) *Cambridge Law Journal* 350, 354). Although Moreham suggests that it is an interference with physical privacy when another disseminates photographs or recordings of private activities to others, it is not clear that Moreham regards the person who merely accesses the images or recordings as having intruded upon the subject matter's seclusion. The ALRC suggests that an intrusion upon seclusion is generally concerned with intrusions into another's physical space, rather than a person who later gains 'sensory' access to that space through images or recordings: see ALRC, above n 11, 76-77 [7.18]. Nevertheless, it is possible that

academic commentary on the matter. In *Lenah*, for example, Gummow and Hayne JJ suggested that the presentation of a person in a false light may not properly concern a privacy interest and commented that '[t]o place the plaintiff in a false light may be objectionable because it lowers the reputation of the plaintiff or causes financial loss or both'.<sup>22</sup> In terms of the appropriation of an image, members of the Australian judiciary, as well as academic commentators, have suggested that this cannot properly be categorised as an invasion of privacy at all.<sup>23</sup> It is also possible that the plaintiff would have to establish that the invasion was intentional<sup>24</sup> and highly offensive, or at least serious,<sup>25</sup> and possibly, also, to prove actual damage.<sup>26</sup> Whether consent would be a defence is

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courts would be prepared to recognise the unwanted access to personal information obtained by another as being an intrusion upon seclusion.

<sup>22</sup> *Lenah* (2001) 208 CLR 199, 256 [125].

<sup>23</sup> *Lenah* (2001) 208 CLR 199, 256 [125] (Gummow & Hayne JJ); see also ALRC, *For Your Information*, above n 9, 2565–6 [74.120]; Raymond Wacks, 'Why There Will Never Be an English Common Law Privacy Tort' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law* (Cambridge, 2010) 154, 177. But see Jonathan Morgan, 'Privacy, Confidence, and Horizontal Effect: "Hello" Trouble' (2003) 62 (2) *Cambridge Law Journal* 444, 450, arguing, in relation to appropriation of image or personality rights, that 'two discrete interests, commercial and dignitary, are aspects of the same legal concern (protection of image), but crucially, they are separable.'

<sup>24</sup> *Grosse* (2003) Aus Torts Reports ¶181-706, 64,133 [446] (Skoien DCJ): because the defendant had wilfully invaded the plaintiff's privacy, it was not necessary to decide if an action for invasion of privacy would encompass negligent acts. However, Skoien DCJ also said that 'a willed act' would, in his view, an essential element of the action: at [444]. In *Doe v ABC* [2007] VCC 281 (3 April 2007), however, Hampel J found that an invasion of privacy was made out on the facts, which involved the publication by the ABC of details of sexual offences perpetrated against the plaintiff, who was identified in the publications. Although the invasion of privacy was not 'wilful' Hampel J nevertheless determined that it was unjustified in that the defendants had failed to exercise reasonable care to protect the plaintiff's privacy: at [163]. This unjustified publication was sufficient to find the defendants liable for an invasion of privacy. In the context of its recommendations for the form of a statutory cause of action for invasion of privacy, the ALRC proposed that the invasion be intentional — that is deliberate or reckless and that no liability should attach to invasions that are negligent or unintentional: ALRC, *Serious Invasions of Privacy*, above n 11, 110 [Recommendation 7-1]. According to the ALRC, the requisite intention could encompass 'a subjective desire or purpose to intrude or to misuse or disclose the plaintiff's private information' or 'circumstances where such an intent may be imputed to the defendant on the basis that the relevant consequences — the intrusion, misuse or disclosure — were, objectively assessed, obviously or substantially likely to follow': ALRC at 110 [7.7].

<sup>25</sup> That the invasion be highly offensive to a person of ordinary sensibilities was considered to be an element of the action in *Grosse* (2003) Aus Torts Reports ¶181-706, 64,187 [444]. In *Lenah* (2001) 208 CLR 199, 226 [42] Gleeson CJ referred to the highly offensive test in the context of an action for intrusion upon privacy in the United States and suggested that it was, in many circumstances, 'a useful practical test of what is private'. The majority decision of the New Zealand Court of Appeal, in *Hosking* [2005] 1 NZLR 1, held that, aside from establishing the existence of facts in relation to which there is a reasonable expectation of privacy, a plaintiff must also establish that publicity given to those private facts would 'be considered highly offensive to an objective reasonable person': at [117] (Gault P and Blanchard J).

<sup>26</sup> It is unclear whether a common law action for invasion of privacy would be actionable per se, that is without proof of harm. In *Grosse* (2003) Aus Torts Reports ¶181-706, 64,187 [44] Skoien DCJ listed detriment 'in the form of mental, physiological, or emotional harm or distress, or which prevents or hinders the plaintiff from doing an act which he or she is lawfully entitled to do' as an element of the action. However, in recommending the introduction of a statutory cause of action for invasion of privacy, the ALRC has noted that framing the tort so as to be actionable per se is consistent with other intentional torts concerned with the plaintiff's intangible, dignitary interests: ALRC, *Serious Invasions of Privacy*, above n 11, 138 [8.40].

uncertain,<sup>27</sup> although there is little doubt that courts would seek to balance the plaintiff's privacy interests with other interests, such as the public interest in free expression.<sup>28</sup> The limitations of a common law action are explored further, in the context of hypothetical scenarios, in Chapter Four.

### *Common Law Action for Invasion of Privacy and Internet Intermediaries*

Because there have been only two cases confirming a common law action for invasion of privacy, neither of which involved the publication of material online, the position of an internet intermediary<sup>29</sup> in relation to material that is published by another in circumstances involving an invasion of privacy is unclear. However, if intention is an element of the action, an internet intermediary is unlikely to be found to possess the requisite intent unless and until, at the very least, they become aware of the existence and nature of the privacy invasive material. Discussing the potential liability of intermediaries for invasions of privacy in the context of their recommendations for a statutory tort of serious invasion of privacy, the ALRC has noted that they should not be liable for invasions of privacy committed by third parties using their services, where they have no knowledge of the invasion of privacy. However, the ALRC has also stated that where intermediaries do have knowledge, there 'does not seem to be any justification to provide a complete exemption from liability.'<sup>30</sup> An internet intermediary hosting content on behalf of others cannot, however, be under a positive obligation to monitor content posted by those others, due to clause 91(1)(b) of schedule 5 of the *Broadcasting Service Act 1992* (Cth), which provides that a law of a state or territory, or a rule of common law or equity, has no effect to the extent to which it 'requires, or would have the effect (whether direct or indirect) of requiring, an internet content host to monitor, make inquiries about, or keep records of, internet content hosted by the host ...'<sup>31</sup>

In addition, an internet content host<sup>32</sup> cannot be liable under any rule of common law or equity, or under the law of a state or territory, where that rule or law

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<sup>27</sup> In *Grosse* (2003) Aus Torts Reports ¶181-706, 64,187 [444] Skoien DCJ did not attempt to state the limits of the action or available defences, and did not refer to a defence of consent (which was not relevant on the facts). In *Doe v ABC* [2007] VCC 281 (3 April 2007) [124], Hampel J observed that consent to being identified in information that was to be broadcast or published, would likely be 'inconsistent' with establishing a reasonable expectation of privacy in relation to publication or the information in question. Whether consent would operate as a specific defence was not considered.

<sup>28</sup> *Grosse* (2003) Aus Torts Reports ¶181-706, 64,187 [447]; *Doe v ABC* [2007] VCC 281 (3 April 2007) [163].

<sup>29</sup> As to the definition of internet intermediary see above n 11.

<sup>30</sup> ALRC, *Serious Invasions of Privacy*, above n 11, 207–08 [11.100].

<sup>31</sup> BSA sch 5, cl 91(1)(b). An internet content host is defined broadly, in sch 5, cl 3, as a 'person who hosts internet content in Australia'. See, further, the list of Defined Terms in this thesis.

<sup>32</sup> As to the definition of internet content host, see above n 31.



subjects, or would have the effect (whether direct or indirect) of subjecting, an internet content host to liability (whether criminal or civil) in respect of hosting particular internet content in a case where the host was not aware of the nature of the internet content ...<sup>33</sup>

However, there are difficult questions as to what type of awareness on the part of the internet content host would be required in order to ground liability — awareness of the existence of the content or awareness that the content is invasive or privacy? Leonard has observed that while there is a dearth of judicial commentary on clause 91(1), it is clear that it requires awareness as to the existence of content rather than awareness that content is infringing. This, according to Leonard, leaves ‘difficult questions as to when and how an internet content host or an internet service provider should take steps to determine whether content is infringing.’<sup>34</sup> While in some instances the private nature of the material might be readily apparent,<sup>35</sup> in others it may not be.

## 2 Breach of Confidence

An action for breach of confidence allows individuals a remedy in relation to the disclosure of confidential information about themselves, including images of themselves, and may enable an individual to restrain the disclosure of that information by way of injunction.

It has been said that the action for breach of confidence action was designed to protect confidential information by reason of the circumstances in which it was obtained<sup>36</sup> and the ‘desirability of protecting and encouraging relationships of trust’.<sup>37</sup> Thus, it is said that the action is borne of and reflects the value of confidential relationships, rather than other values such as those usually said to underlie privacy: notably dignity<sup>38</sup> and autonomy.<sup>39</sup> On the other hand, although confidentiality and privacy may be regarded as ‘radically

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<sup>33</sup> BSA sch 5, cl 91(1)(a).

<sup>34</sup> Peter Leonard, ‘Storms Batter Not-So-Safe Harbours – Liability of Internet Intermediaries in Australia’ (2012) 88 *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and New Zealand* 41, 49.

<sup>35</sup> See, eg, *Lenah* (2001) 208 CLR 199, 226 [42] (Gleeson CJ) where His Honour said that: ‘Certain kinds of information about a person, such as information related to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand was meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.’

<sup>36</sup> NSWLRC, *Invasion of Privacy*, Consultation Paper 1 (2007), 55 [2.81].

<sup>37</sup> Timothy Pitt-Payne, ‘Problems and Pit-falls for Information Sharing’ (Paper presented at the Third Northumbrian Information Rights Conference, Northumbria University, 17 April 2009); *Campbell* 2 All ER 995, 1009 [44] (Lord Hoffman).

<sup>38</sup> See, eg, *Lenah* (2001) 208 CLR 199, 226 [43] (Gleeson CJ).

<sup>39</sup> See, eg, *Lenah* (2001) 208 CLR 199, 226 [43] (Gleeson CJ), 256 [125]-[126] (Gummow & Hayne JJ); *Campbell* [2004] 2 All ER 995, 1010 (Lord Hoffman). Nevertheless the conceptual basis of a breach of confidence action has been debated: See, eg, Gareth Jones, ‘The Restitution of Benefits acquired in Breach of Another’s Confidence’ (1970) 86 *Law Quarterly Review* 463 and Sam Ricketson, ‘Confidential Information – A New Proprietary Interest? Part I’ (1977) 11 *Melbourne University Law Review* 223.

different qualities’,<sup>40</sup> Writing even before the *Human Right Act*<sup>41</sup> introduced directly into UK law certain provisions of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (also known as the *European Convention on Human Rights* (‘ECHR’)),<sup>42</sup> including a right to privacy, Gurry had observed that in the context of breach of confidence cases involving personal information ‘privacy seems paramount’ and that ‘the courts are prepared to allow a person to control the flow of personal information’ about themselves by way of an action for breach of confidence.<sup>43</sup> That privacy is a value underlying the breach of confidence action was also recognised by the House of Lords in *Campbell*:

The right to privacy is in a general sense one of the values, and sometimes the most important value, which underlies a number of more specific causes of action, both at common law and under various statutes. One of these is the equitable action for breach of confidence, which has long been recognised as capable of being used to protect privacy.<sup>44</sup>

The traditional formulation of a breach of confidence action requires the plaintiff to establish that confidential information relating to the plaintiff has been used, or its use threatened, in contravention of an obligation of confidence owed by the defendant to the plaintiff.<sup>45</sup> In addition, the plaintiff may be required to identify the information in question with specificity.<sup>46</sup> Whether detriment is also an element of the action for breach of confidence is not firmly settled.<sup>47</sup>

In terms of whether information is confidential, it is said that the information itself must possess a sufficient ‘quality of confidence’.<sup>48</sup> Information of a trivial nature and mere gossip will not possess the necessary quality of confidence.<sup>49</sup> In addition, information

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<sup>40</sup> Jonathan Morgan, ‘Privacy, Confidence, and Horizontal Effect: “Hello” Trouble’ (2003) 62 (2) *Cambridge Law Journal* 444, 452.

<sup>41</sup> *Human Rights Act 1998* (UK) c4.

<sup>42</sup> ECHR art 10.

<sup>43</sup> Francis Gurry, *Breach of Confidence* (Clarendon Press, 1984) 98. Note that a new edition of Gurry was published in 2012: Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2<sup>nd</sup> ed, 2012).

<sup>44</sup> *Campbell* [2004] 2 All ER 995, 1008 [43] (Lord Nicholls).

<sup>45</sup> *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47 (Megarry J) (‘Coco v Clark’).

<sup>46</sup> *Optus Networks Pty Ltd v Telstra Corporation Ltd* (2010) 26 ALR 281 [39] (Finn, Sundberg and Jacobsen JJ) citing *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* [1989] FCA 384; (1990) 22 FCR 73, 87.

<sup>47</sup> *Coco v Clark* [1969] RPC 41, 48 (Megarry J) and *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 (Lord Goff) (‘Guardian No 2’) both keeping open the question as to whether detriment is required. See also *X v Y* [1988] 2 All ER 648, 657 (Rose J). In *Ammon v Consolidated Minerals Ltd [No 3]* [2007] WASC 232, Martin CJ was of the view that ‘although the matter is not entirely free from doubt, the better view seems to be that detriment is not an essential element of the cause of action’ [310]. See also *Wilson v Ferguson* [2015] WASC 15 (‘Wilson’), where the court noted that although in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 Mason J had noted the requirement to show detriment, that requirement had been doubted in subsequent cases: 43 (Mitchell J).

<sup>48</sup> *Coco v Clark* [1969] RPC 41, 47 (Megarry J).

<sup>49</sup> *Ibid* 48 (Megarry J). Gurry, above n 43, 81 notes some uncertainty around this requirement.

must be outside of the public domain, ‘not something which is public property and public knowledge’<sup>50</sup>, or be ‘inaccessible’.

Gurry has suggested that in cases of personal confidences, the requirement of ‘inaccessibility’ takes on a rather peculiar meaning and can be ‘be ‘stretched’ to allow for the protection of private information.<sup>51</sup> He cites the case of *Pollard v Photographic Co*<sup>52</sup> in which the court restrained the defendant from displaying in his shop window photographs of the plaintiff that had been commissioned by the plaintiff for her private use. Gurry writes that:

The confidential information in this case consisted of the reproduction of a likeness of the plaintiff, which seems to strain the meaning of inaccessibility since, no doubt, the plaintiff’s visage was well known in the town in which she lived. The case emphasizes the policy of protecting privacy which lies behind the jurisdiction in this area and it seems that the courts are prepared to allow a person to control the flow of personal information concerning himself by means of an action for breach of confidence.<sup>53</sup>

The older authority of *Pollard* has, however, often been construed as a decision based upon contract.<sup>54</sup> Nevertheless, courts in England and Wales have been prepared to accommodate protection for a number of discrete areas of private life within the cause of action for breach of confidence.<sup>55</sup> However, according to Phillipson, it was not until the House of Lords decision in *Campbell* that this first limb of the breach of confidence action was ‘transformed’ so as to encompass information of a personal or private rather than confidential nature.<sup>56</sup> According to Phillipson the effect of the decision of the House of Lords in *Campbell* (the facts of which were outlined previously in Chapter One) was the ‘abandonment’ of ‘tests based upon *confidentiality* of the information, as opposed to its private character.’<sup>57</sup> Reinforcing his observation, Phillipson suggests that ‘it would clearly seem inapt to describe events taking place in the street, witnessed by numerous people,

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<sup>50</sup> Gurry, above n 43, 4 citing *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, 215 per Lord Greene MR.

<sup>51</sup> Ibid 98 referring to *Pollard v Photographic Co* (1888) 40 Ch.D 345.

<sup>52</sup> (1889) 40 Ch D 345 (*‘Pollard’*).

<sup>53</sup> Gurry, above n 43, 98.

<sup>54</sup> Megan Richardson et al, *Breach of Confidence: Social Origins and Modern Developments* (Edward Elgar Publishing, 2012) 60.

<sup>55</sup> Gavin Phillipson, ‘The “Right” of Privacy in England and Strasbourg Compared’ in *New Dimensions in Privacy Law*, Andrew T Kenyon and Megan Richardson (Eds) (Cambridge University Press, 2006) 184, 193 (and refer to the types of information and cases cited by Phillipson 193 n 41). See also, generally, Gavin Phillipson, ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act’ (2003) 66 *Modern Law Review* 726 reviewing a number of cases where personal information has been protected under the breach of confidence action. However, in *Google Inc v Vidal-Hall & Ors* [2015] EWCA Civ 311 (27 March 2015) (*Vidal-Hall*), the Court of Appeal of England and Wales confirmed that an action in tort for misuse of private information, and an action for breach of confidence, are ‘now two separate and distinct causes of action’: [21] (McFarlane MR and Sharp LJ).

<sup>56</sup> Gavin Phillipson, ‘The “Right” of Privacy’, above n 55, 185.

<sup>57</sup> Ibid 197.

as “confidential”,<sup>58</sup> a view echoed by other commentators.<sup>59</sup> The suggestion here is that the information in question is accessible, or in the public domain, and cannot therefore be considered to possess the necessary quality of confidence. Arguably, however, *Campbell* was concerned with ‘confidential information’ in the traditional sense – namely information about Ms Campbell’s health that was neither trivial, nor generally accessible. The case did *not* concern the mere description or depiction of events that took place in public, witnessed by numerous people. Rather, the images of Ms Campbell, taken in conjunction with the text with which they were inextricably linked,<sup>60</sup> communicated information about Ms Campbell’s addiction and treatment. As Lord Hope observed:

The words: ‘Therapy: Naomi outside meeting’ underneath the photograph on the front page and the words ‘Hugs: Naomi dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week’ underneath the photograph on p13 were designed to link what might otherwise have been anonymous and uninformative pictures with the main text.<sup>61</sup>

If it is accepted that the images and text are inextricably linked then, on this reading of *Campbell*, there was no transformation of the requirement that information must be confidential in the sense of being inaccessible. Nevertheless, developments subsequent to *Campbell* show that the courts of England and Wales are now prepared to accept that even information that *is* generally accessible, in the sense of being in the public domain — such as the way a particular person looks on a day-to-day basis — may nevertheless be regarded as capable of protection by way of the breach of confidence action, provided the information can be said to be ‘private’.<sup>62</sup> It cannot, however, be said that a similar

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<sup>58</sup> Ibid echoing the view earlier expressed by Morgan such that: ‘non-consensual photographs of an individual in a public space may infringe privacy. Yet such information in the public domain cannot be protected by an action designed to preserve confidentiality.’ See Morgan, above n 40, 453. See also Moreham who writes that the majority in *Campbell* [2004] 2 All ER 995 used the terms ‘confidential’ and ‘private’ interchangeably, whereas the minority expressly acknowledged that the concepts of privacy and confidence had ‘merged in cases involving the disclosure of personal information’: Nicole Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review*, 628, 629. However, in so far as the second limb of the breach of confidence action has (in the United Kingdom at least) been transformed to dispense with the requirement of a pre-existing relationship of confidence or even of any requirement that there has been an ‘impairing’ of information from one party to the other (discussed further in section 2) below, it is true that describing as ‘confidential’ information which does not depend upon this relationship is probably misleading.

<sup>59</sup> Morgan, above n 40, 453; Des Butler, ‘A tort of invasion of privacy in Australia?’ (2005) 29 *Melbourne University Law Review* 339, 352.

<sup>60</sup> As Lord Hope observed: ‘The words: “Therapy: Naomi outside meeting” underneath the photograph on the front page and the words “Hugs: Naomi dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week” underneath the photograph on p13 were designed to link *what might otherwise have been anonymous and uninformative pictures* with the main text.’ *Campbell* [2004] 2 All ER 995, 1028 [121] (emphasis added).

<sup>61</sup> *Campbell* [2004] 2 All ER 995, 1028 [121] (emphasis added).

<sup>62</sup> So, for example, in *Murray v Big Pictures* [2008] EWCA Civ 446 (*‘Murray’*) the author J K Rowling was successful on behalf of her son David in overturning an order striking out the claim for an infringement of his privacy (and under the *Data Protection Act 1998* (UK)) when photographs of him were taken in a public place, by the use of a long-range lens. The Court of Appeal was anxious to emphasise that David arguably

transformation has taken place in Australia. In *Lenah*, Gleeson CJ certainly suggested that the law should be ‘more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy’<sup>63</sup> and also noted that certain information may easily be identified as private. This includes information about someone’s health, personal relationships or finances and certain kinds of activity ‘which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.’<sup>64</sup> These examples of private information are also examples of information that is neither trivial nor generally accessible.<sup>65</sup> That said, it is possible that a closer focus on privacy interests will result in information that *is* generally accessible (such as the way a plaintiff looks on a day-to-day basis) being treated as possessing the necessary quality of confidence in certain circumstances, perhaps where the plaintiff is a child,<sup>66</sup> or in circumstances involving intrusive photography.<sup>67</sup> For the time being, however, there is no higher court authority in Australia for the proposition that a breach of confidence action can be used to remedy the use or threatened use of accessible (and/or trivial) information on the basis that it is, nevertheless, private.<sup>68</sup>

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had a reasonable expectation of privacy, not because of anything inherently private about or arising from the photographs (which only depicted him as he must often have appeared) but because the image was taken in a clandestine manner and was published for commercial gain as part of a series of photographs and in circumstances where the publisher knew that consent of the parents to the photographs would not have been forthcoming even had it been requested: *Murray* [17]. Nevertheless, the images did concern a private interest (David engaged on a family outing). The developments in England and Wales have, of course, taken place in the context of the ‘new’ approach to breach of confidence, recognising that the values enshrined in Articles 8 and 10 of *ECHR* are now part of the action for breach of confidence: *Campbell* [2004] 2 All ER 995, 1033 [17] (Lord Nicholls). Lord Hope did not agree that the centre of gravity of breach of confidence had shifted due to the recognition of the rights enshrined in articles 8 and 10, but rather that the ‘language had changed’ — nevertheless he recognised that the articles have ‘new breadth and strength’ to the breach of confidence action: *Campbell* 1017–18 [86].

<sup>63</sup> *Lenah* (2001) 208 CLR 199, 16 [40].

<sup>64</sup> *Ibid* 226 [42].

<sup>65</sup> On the other hand, *Lenah* concerned information that it had been conceded was not confidential, because it was accessible: *Ibid* 223 [30] (Gleeson CJ). Thus, Gleeson CJ’s suggestion (at 225 [39]) could be taken to suggest that accessible but private information is capable of protection under the action for breach of confidence. However, the activities in question were found not to be private (at 227 [43] (Gleeson CJ)) and, as discussed further later in this section, it may be difficult in any event to establish a reasonable expectation of privacy in relation to information that is generally accessible.

<sup>66</sup> As to this, refer to the discussion in Chapter Four, Part Four (Case Study Five – Tyger and Lilly) as to considerations which have been determined to be applicable in deciding whether or not a child has a reasonable expectation of privacy.

<sup>67</sup> However, any extension of the breach of confidence action in this way would present numerous challenges beyond those inherent in identifying when information is ‘private’. Not the least of these would be determining whether the requirement as to an obligation of confidence will be applied differently to situations where information does not possess the attribute of inaccessibility as to those where it does; whether a broader public interest defence should apply to information that is accessible as opposed to information that is inaccessible; and whether corporations can be said to have a valid claim to ‘privacy’. A more detailed discussion of the challenges here is beyond the scope of this chapter. However, in relation to the difficulties of requiring the privacy claimant to establish an obligation of confidence see Butler, above n 59, 352 and Richardson et al, above n 54, 147.

<sup>68</sup> Furthermore, given that for information to be considered private it is likely that a plaintiff would need to establish, as a minimum, a reasonable expectation of privacy and thus the extent to which the information

In determining the accessibility or otherwise of the information, the steps taken to ensure that information remains inaccessible are a relevant consideration. Thus, in *Lenah*, Gleeson CJ referred to the fact that the appellants did not impose the requirements of confidentiality on people who might see the processing operations.<sup>69</sup> In *Campbell*, at least one of the judges considered the facts of Ms Campbell's addiction and treatment as being in the public domain because Ms Campbell herself had frequently raised the topic of drug addiction by publicly asserting on a number of occasions that she had no such addiction.<sup>70</sup> By contrast, in relation to her attendance at Narcotics Anonymous, Ms Campbell had been more guarded: she was, in the words of Baroness Hale, 'engaged, deliberately "low key and drably dressed"', in the private activity of therapy.<sup>71</sup> On the other hand a plaintiff is entitled to place trust in a person with whom they have a pre-existing confidential relationship. So, for example, in *Giller v Procopets* the fact that Ms Giller became aware that she was being filmed by her partner during periods of sexual intimacy with him did not mean that she had failed to protect the accessibility of the information.<sup>72</sup> Likewise, in *Wilson*, a recent case concerning the posting to Facebook of intimate personal images of his ex-lover by the defendant, the court noted as follows:

The explicit nature of the images was itself suggestive of their confidential character. Intimate photographs and videos taken in private and shared between two lovers would ordinarily bear a confidential character, and be implicitly provided on condition that they not be shown to any third party.<sup>73</sup>

The current position in Australian law, then, is that there can be no action in breach of confidence to restrain what is merely an unwanted or unauthorised disclosure of an image unless the information revealed by the image has the necessary 'quality of confidence'. In order to possess the necessary quality of confidence, the information must be non-trivial and 'inaccessible' or 'relatively inaccessible' so that it can be said to be outside the public domain. Gurry has written that, aside from these basic attributes 'there are few formal requirements relating to the substance of the information which can be considered confidential.'<sup>74</sup> However, it is Phillipson's view that as courts have been required to

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is inaccessible and non-trivial may, in any event, be relevant. As noted in Chapter Six, it is telling that examples given by the ALRC of disclosures that would constitute an invasion of privacy within the scope of the proposed cause of action for invasion of privacy all relate to information that is *inherently* private or to images that capture the plaintiff in an intimate or embarrassing moment. If courts were to adopt this formulation, therefore, a reasonable expectation of privacy is likely only in relation to inaccessible or relatively accessible information: see further the discussion in Chapter Six, Part Three, Section A (Statutory Cause of Action for Invasion of Privacy).

<sup>69</sup> *Lenah* (2001) 208 CLR 199, 221 [25] (Gleeson CJ).

<sup>70</sup> *Campbell* [2004] 2 All ER 995, 1004–5 [24] (Lord Nicholls). The other judges did not explicitly regard Ms Campbell's claims as to non-addiction as having put the fact of her addiction into the public domain, so much as creating an area of legitimate press comment: the press were 'entitled to put the record straight': at 1017 [83] (Lord Hope).

<sup>71</sup> *Ibid* 1030 [130].

<sup>72</sup> [2004] VSC 113 (7 April 2004).

<sup>73</sup> *Wilson* [2015] WASC 15 (16 January 2015) [56].

<sup>74</sup> Gurry, above n 43, 81.

determine breach of confidence actions involving non-commercial information they have needed to develop workable tests for deciding what kinds of personal information would have the necessary quality of confidence, save for the negative requirements of being outside the public domain and non-trivial.<sup>75</sup> In terms of what kinds of information will be confidential, it has been suggested that it may be that no absolute test can be settled, and that the

issue will always be one requiring consideration through the medium of analogies drawn from decided authorities and a close analysis of the facts of each case, particularly the nature of the information and its relationship to the business or other activity of the confider.<sup>76</sup>

This is in line with Gurry's suggestion that courts have preferred to take a pragmatic, 'recognition' approach to decide whether information is confidential, rather than to develop rigid definitions of what constitutes confidentiality.<sup>77</sup>

This 'know it when you see it' approach might also assist in determining whether 'false' information can nevertheless be regarded as confidential. Whether false information can be protected as confidential has been described as a 'thorny and as yet unresolved' issue.<sup>78</sup> Stanley has written that, in the UK context, only certain categories of false information are likely to be protected as confidential.<sup>79</sup> One category in which it has been suggested that untrue information will usually be regarded as confidential is where the false information has been 'learned' (as true) in the course of a confidential relationship.<sup>80</sup> The second category is where false information is inherently 'confidential' (or private).<sup>81</sup> Outside of those categories, Stanley has suggested that it is questionable how far protection will extend.<sup>82</sup> The position in the Australian context may be different, although there is scant authority on point. In *Brand v Monks*, Ward J accepted the proposition advanced by Sedley LJ (with which Longmore LJ and Ward LJ agreed) in *Financial Times Limited & Ors v Interbrew SA*<sup>83</sup> that there can be no confidentiality in false information.<sup>84</sup>

Arguably, however, the need to identify what quality information must possess, beyond the negative qualities of inaccessibility and non-triviality, is most exigent when the second limb of the breach of confidence action is either abandoned entirely, or is 'transformed'

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<sup>75</sup> Phillipson, 'Transforming Breach of Confidence', above n 55, 732-33.

<sup>76</sup> Michael Evans, Bradley L Jones and Theresa M Power, *Equity and Trusts* (LexisNexis, 4<sup>th</sup> ed, 2016) 203 [14.4].

<sup>77</sup> Gurry, above n 43, 70.

<sup>78</sup> Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 166 [5.62].

<sup>79</sup> Paul Stanley, *The Law of Confidentiality: A Restatement* (Bloomsbury Publishing, 2008) 16.

<sup>80</sup> *Ibid* 16-17.

<sup>81</sup> *Ibid* 17.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Financial Times Limited & Ors v Interbrew SA* [2002] EWCA Civ 274 (8 March 2002) [27].

<sup>84</sup> *Brand v Monks* [2009] NSWSC 1454 (21 December 2009) [218]. See also *Callejo and Department of Immigration and Citizenship* [2010] AATA 224 (8 April 2010).

so as to dispense with the need for a pre-existing relationship of confidence. This is because, in the words of Lord Nicholls in *Campbell*, '[t]he confidence referred to in the phrase 'breach of confidence' was the confidence arising out of a confidential relationship.'<sup>85</sup> Since the decision in *Campbell*, the courts of England and Wales have 'decisively and unambiguously removed' the element of the breach of confidence action requiring the information to have been imparted in circumstances importing an obligation of confidence.<sup>86</sup> Now it is clear that an obligation of confidence will be imposed 'whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.'<sup>87</sup> In relation to personal information, the duty of confidence will be imposed 'whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected.'<sup>88</sup> As such, determining whether personal information is (objectively) 'private' is fundamental to determining whether a person can be required to maintain its privacy (or respect its confidentiality).<sup>89</sup> The position in Australia is less clear-cut.

In Australia, it does appear to be accepted that an obligation of confidence can be imposed absent a pre-existing relationship<sup>90</sup> and will almost certainly be imposed on a person who has improperly or surreptitiously captured confidential information, or where images, depicting something that is confidential or private, have been obtained improperly or captured surreptitiously.<sup>91</sup> It also seems established that an obligation of

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<sup>85</sup> *Campbell* [2004] 2 All ER 995, 1002 [13] (Lord Nicholls). See also Lord Hoffman (at 1009 [44]) remarking that the action 'did not depend upon the personal nature of the information or extent of publication but upon whether a confidential relationship existed between the person who imparted the information and the person who received it.'

<sup>86</sup> Gavin Phillipson, 'The "right" of privacy', above n 55, 185.

<sup>87</sup> *Campbell* [2004] 2 All ER 995, 1002 [14] (Lord Nicholls); see also Lord Hoffman at 1009-10 [44]-[48]; Lord Hope at 1017 [85] and Baroness Hale at 1032 [134]. However, as the tort of misuse of private information and an action for breach of confidence have now been confirmed by the Court of Appeal of England and Wales as entirely separate actions (*Vidal-Hall* [2015] EWCA Civ 311 (27 March 2015)), there is a question as where the doctrine of breach of confidence is now. This question (albeit considered before the judgment in *Vidal-Hall*) is canvassed by Richardson et al, above n 54, 144-149.

<sup>88</sup> *Ibid* 1017 [85] (Lord Hope). See, however, Chris Hunt, "'Mens Rea". Breach of Confidence and the Implications for England's Privacy "Tort"' (2013) 72(3) *The Cambridge Law Journal* 504, 508 concluding that the Supreme Court's decision in *Verstergaard Frandsen v Bestnet Europe Ltd* [2013] UKSC 31 could have 'serious consequences' for development of the protection of privacy, given the finding that the obligation of confidence only arises where the defendant either agreed to keep the information confidential or knew, subjectively, rather than objectively, that the information was confidential.

<sup>89</sup> One reason for this transformation is 'the acceptance, under the influence of human rights instruments such as art 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 ... of the privacy of personal information as something worthy of protection in its own right': *Campbell* [2004] 2 All ER 995, 1009 [46] (Lord Hoffman).

<sup>90</sup> *Lenah* (2001) 208 CLR 199, 224-5 [34]-[36], 225 [39] Gleeson CJ was of the view that a pre-existing relationship of confidence was unnecessary in order to find that the defendant was under an obligation of confidence. Nevertheless, the need to establish the existence of a confidential relationship seems to persist in some judgments: see, eg, *Power v Mann* [2010] VCC 1401 (25 October 2010), 6 [26] (Misso J).

<sup>91</sup> *Lenah* (2001) 208 CLR 199, 224 [34], 230 [55] (Gleeson CJ), 271-2 [169] (Kirby J). But see Richardson et al, above n 54, 146-7 which suggests that propositions that that development of the breach of confidence action in the UK in the post human-rights era has 'moved beyond "old-fashioned" breach of confidence' to a tort of misuse of private information, may have the 'unintended consequences' that 'those jurisdictions of



confidence can be placed upon a party who comes into possession of private or confidential information that they know was improperly or surreptitiously obtained by another.<sup>92</sup> The ALRC recently expressed the view that it is ‘well accepted in the United Kingdom (UK) and Australia that an obligation of confidence may arise where a party comes into possession of information which he or she knows, or ought to know, is confidential’.<sup>93</sup> Here the ALRC cites the UK decision in *Attorney-General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109 (*Guardian (No 2)*) and the Australian decision in *Lenah*.<sup>94</sup> However, the illustrations given by Lord Goff in *Guardian (No 2)* as to circumstances in which an obligation of confidence would be imposed absent a pre-existing obligation of confidence relate to ‘obviously confidential’ information – a private diary or an ‘obviously confidential document’.<sup>95</sup> Nahan has noted that whether information is ‘obviously’ confidential is the key issue in the jurisprudence on accidental confidences, although the meaning of ‘obviously’ is unclear.<sup>96</sup> As for *Lenah*, it is doubtful that the case supports the broad proposition that an obligation of confidence arises due to the nature of the information per se, as opposed to confirming the narrower proposition that the obligation extends to a person who obtains confidential or private information illegally, improperly or surreptitiously.

Without forming a definitive view on the current position, it is important to note that there is little Australian authority for the proposition that an obligation of confidence can be imposed merely due to the nature of the information.<sup>97</sup> In any event, as Butler has

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the Commonwealth which choose to protect private under breach of confidence rather than a sui generis information privacy tort are circumscribed by the relational language of Megarry J in *Coco v AN Clark (Engineers)*.’ See also The NSWLRC has stated that it regards as questionable the extent to which the breach of confidence action can be used to protect information that was not disclosed in breach of an obligation of confidence: NSWLRC, Report, above n 3, 14 [4.8] The NSWLRC suggests that transforming the action in this way would involve a fusion of law and equity that the common law is unlikely to embrace: NSWLRC, *Consultation Paper*, above n 36, 55 [2.81]–[2.82].

<sup>92</sup> *Lenah* (2001) 208 CLR 199, 225 [39] where Gleeson CJ suggests that if the ABC had known the information was obtained improperly or surreptitiously that this would be sufficient to place them under an obligation of confidence, where the information itself was private; *Power v Mann* [2010] VCC 1401; *Davis v Mann* [2010] VCC 1402.

<sup>93</sup> ALRC, *Serious Invasions of Privacy*, above n 11, 51 [3.48] (Emphasis added).

<sup>94</sup> Ibid citing *Guardian No 2* (1990) 1 AC 109 and *Lenah* (2001) 208 CLR 199, 224 (Gleeson CJ).

<sup>95</sup> *Guardian No 2* (1990) 1 AC 109, 281.

<sup>96</sup> Nyuk Nin Nahan, ‘The Duty of Confidence Revisited: The Protection of Confidential Information’ (2015) 39(2) *University of Western Australia Law Review* 270, 282.

<sup>97</sup> But see *Doe v ABC* [2007] VCC 281 (3 April 2007) in which Hampel J found, at [115] that the breach of confidence arose due to the nature of the information rather than a breach of the duty of trust. Following on from the observation quoted above, Hampel J expressed the view that the formulation of a breach of confidence action in Australian law was consistent with the formulation of the action in the United Kingdom. Watson has described this view as ‘optimistic’: Penelope Watson, ‘Remedies for Novel Torts: Invasion of Privacy’ (2008) *Journal of the Australasian Law Teachers’ Association* 391, 397. In any event, *Doe* is poor authority for this broad proposition given that the defendants were, in any event, under a statutory obligation to maintain the confidence of the information by virtue of the *Judicial Proceedings Reports Act 1958* (Vic) – a fact recognised by Hampel J, at [128]. See also *Trevorrow v State of South Australia* (No 4) [2006] SASC 42 (16 February 2006) [80] (Debelle J): ‘The court will restrain publication where the confidential information has been acquired improperly or surreptitiously ... or where the person to whom

observed, even if an obligation of confidence arises due to the nature of the information, reasonable ignorance that the information was confidential or private will defeat the action.<sup>98</sup>

Given the above, it is suggested that in the context of determining the obligation of confidence, at least, it is essential to have regard to the nature of the information (beyond the negative requirements of inaccessibility and non-triviality). Where there is no pre-existing relationship of confidence between the plaintiff and the defendant it becomes necessary to determine whether personal information was by its nature confidential or *private*. This presents the additional difficulty as to what test is to be used to determine the private nature of material. Is the Gleeson test (information that is ‘obviously private’ or the disclosure of which would be ‘highly offensive to a reasonable to a reasonable person of ordinary sensibilities<sup>99</sup>) the correct test as to whether information is private? As Phillipson has noted, this general test was, at least until *Campbell*, the one laid down by UK cases, after the introduction of the *Human Rights Act* 1998.<sup>100</sup> Or, is the test an expanded one, requiring consideration of whether the plaintiff had a reasonable expectation of privacy in all the circumstances?<sup>101</sup> If it is the latter, then is a lack of actual or subjective knowledge on the part of a recipient of the information irrelevant? Again, these questions seem unresolved in the Australian context.

To place the above discussion in the context of images, an image capturing a person engaged in a private activity (such as showering, sexual relations or even a private ceremony)<sup>102</sup> will probably be treated as confidential, even where the plaintiff has

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the confidential information has been disclosed seeks to use it in breach of the terms on which it was disclosed and to the detriment of the party who communicated the confidential information ... The principle will apply also where a person innocently comes into possession of confidential information through the inadvertence of another ... the court would be enforcing the obligation of conscience arising from the fact that the finder came into possession of the information in circumstances in which it was not intended that the confidential information could be used by the finder.’ (References omitted)

<sup>98</sup> Butler, above n 59, 352. And it may be that absent an agreement to retain confidence or actual subjective knowledge of confidence, the obligation will not arise: Hunt, above n 88, 508 concluding that the Supreme Court’s decision in *Verstergaard Frandsen v Bestnet Europe Ltd* [2013] UKSC 31 could have ‘serious consequences for development of the protection of privacy, given the finding that the obligation of confidence will only arise where the defendant either agreed to keep the information confidential or knew, subjectively, that the information was confidential.’

<sup>99</sup> *Lenah* (2001) 208 CLR 199, 226 (Gleeson CJ).

<sup>100</sup> Phillipson, ‘Transforming Breach of Confidence’, above n 55, 733-4 and see, eg, *Campbell v Mirror Group Newspapers Ltd* [2003] 1 All ER 224, 237-238.

<sup>101</sup> This would be in line with the test favoured by the ALRC, *Serious Invasions of Privacy*, above n 11, 92 [6.1]-[6.4]; see also [2008] EWCA Civ 446 [36] (Sir Anthony Clarke MR, Laws LJ and Thomas LJ).

<sup>102</sup> See, eg, *Giller* (2008) 24 VR 1 and *Wilson* [2015] WASC 15 (16 January 2015) (images of people engaged in sexual activity) and *Power v Mann* [2010] VCC 1401 and *Davis v Mann* [2010] VCC 1402 (videotaping people in a bathroom). As to private ceremonies, see *Douglas*; *Foster v Mountford* (1976) 29 FLR 233. However, whether pictures of private ceremonies will be considered to be actually confidential will depend on the circumstances and the extent to which the information could be considered ‘relatively secret’ — thus in *Douglas* the plaintiffs had gone to some lengths to preserve the confidentiality of images of their wedding, for example, by requiring all service providers to sign confidentiality agreements and having security guards check that guests were not carrying cameras or other recording equipment.

consented to the capture (but not the subsequent use) of the image.<sup>103</sup> An image showing a person naked or in a state of undress will also probably be considered confidential, at least where the person is in a place where they expect to be unobserved.<sup>104</sup> All of these examples relate to information that has a quality of confidence in that the information is non-trivial and is inaccessible or relatively inaccessible. The obligation of confidence will likely be imposed due to a pre-existing relationship of confidence and/or the fact that the information has been improperly or surreptitiously obtained.

There is also an argument that certain images captured in public might nevertheless be regarded as revealing information that is sufficiently inaccessible as to be outside of the public domain. That is, images communicating information about a person's health, or other non-trivial and inaccessible information might be regarded as confidential. The fact that the images are captured in a public place does not necessarily put the information into the public domain if it is accepted that even activities occurring in public are (unless captured on film and subsequently communicated more broadly) observable to only a limited audience.<sup>105</sup> This would coincide with the approach taken by the House of Lords in *Campbell*. However, if a person has taken few or no steps to protect the inaccessibility of the information presented in a public place, the chances of the information being regarded as confidential (or private) will diminish. Thus, a distinction might be drawn between a situation where a person, albeit in a place accessible to the public, has sought seclusion (for example, in a doorway) or anonymity (for example, by adopting a deliberately 'low-key' appearance) and someone who has not. An obligation of confidence could arise due to the way in which the information is obtained (for example, where it is obtained surreptitiously by the use of a long-range lens). It is less clear that an obligation would arise simply on the basis that the person seeking protection had a reasonable expectation of privacy such that their seclusion would not be intruded upon, or that information (including images) would not be disseminated. Moreover, reasonable ignorance of an expectation of privacy would defeat the action.

A focus on privacy interests may also persuade a court to treat as confidential information that is accessible (in the public domain) and/or trivial – such as the way a person looks on a day-to-day basis or what they were doing at a particular moment in time. That would, however, depend on the anterior step of classifying such information as private. In this regard, as previously discussed, a plaintiff will almost certainly need to establish a reasonable expectation of privacy. In relation to generally accessible or trivial information establishing an expectation of privacy is, in any event, likely to be difficult.<sup>106</sup> Even so, on current authority, it seems unlikely that courts would recognise accessible and/or trivial

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<sup>103</sup> See, eg, *Giller* (2008) 24 VR 1 and *Wilson* [2015] WASC 15 (16 January 2015) in which some of the images in question were captured – but not distributed – with the knowledge and consent of the respective plaintiffs.

<sup>104</sup> See *Lenah* (2001) 208 CLR 199, 226 [42] (Gleeson CJ).

<sup>105</sup> *Campbell* [2004] 2 All ER 995, 1028 [122] (Lord Hope).

<sup>106</sup> See the discussion in Section 1 (Common Law Action for Invasion of Privacy) above.

(albeit private) information as possessing the necessary quality of confidence. If that is so, the question of whether there was an obligation of confidence does not fall to be considered. On the other hand, if such information is considered confidential, the plaintiff will need to show that the person seeking to use the information was under an obligation of confidence either due to a pre-existing relationship, the way in which the information was obtained (that is, surreptitiously or improperly) or because of the nature of the information.

It would seem that the action for breach of confidence cannot be said to have been transformed in the same way as it has in the UK to become a fully-fledged action encompassing protection against the unauthorised disclosure of private information (at least not where information is considered generally accessible).<sup>107</sup> If it is to become so, there are significant considerations still to be worked out: as Callinan J observed in *Lenah* '[t]he value of free speech and publication in the public interest must be properly assessed, but so must the value of privacy. The appropriate balance would need to be struck in each case.'<sup>108</sup> Although Callinan J was referring here to the development of a discrete tort of invasion of privacy, it is submitted that these comments are equally applicable to any development of the breach of confidence action to protect private information.<sup>109</sup> Moreover, if breach of confidence should be developed to encompass private information of a type not previously within the scope of the action (that is,

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<sup>107</sup> *Lenah* (2001) 208 CLR 199, 327 [329] (Callinan J).

<sup>108</sup> *Ibid* 328 [334].

<sup>109</sup> Developments of the breach of confidence action in the United Kingdom have occurred in a very different context to that extant in Australia: notably the incorporation into domestic law of the United Kingdom of the *ECHR*. In *Campbell* [2004] 2 All ER 995, 1002 [16] Lord Nicholls commented that 'the provisions of ECHR art 8, concerning respect for private and family life, and ECHR art 10, concerning freedom of expression, and the interaction of these two articles, have prompted the courts of this country to identify more clearly the different factors involved in cases where one or other of these two interests are present.' His Lordship went on to say that 'the time has now come to recognise that the values enshrined in arts 8 and 10 are now part of the cause of action for breach of confidence': at [17]. Thus, in the United Kingdom the question of whether a person has a reasonable expectation of privacy is a preliminary question, to be established *before* and independently of a consideration of issues going to proportionality and factors to be taken into account in balancing the privacy expectation with other concerns, such as the public interest in freedom of expression. Nevertheless, in the United Kingdom, a broad public interest defence was well established even before the *Human Rights Act 1998* (UK) c 42 and was, according to Richardson et al, 'considered beyond question' by the 1980s: Richardson et al, above n 54, 129. In Australia, however, the way in which and the extent to which concerns of public interest and freedom of expression are factored into a breach of confidence action involving the disclosure of private (personal) information is not settled. In *Lenah* (2001) 208 CLR 199, 224 [34] Gleeson CJ expressed support for the proposition put forward by Laws J in *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, 476 such that photographs captured without consent by the use of a long-range lens and depicting another engaged in a private act would be capable of protection by breach of confidence but that a 'defence based on the public interest would be available'. Gleeson CJ agreed with that proposition adding that, in order to 'adapt it to the Australian context' it would be necessary to add a qualification 'concerning the constitutional freedom of political communication': *Lenah* (2001) 208 CLR 199, 224 [35]. However, the extent to which a public interest defence to a breach of confidence action is generally available has been questioned by some: see, eg, Graeme McEwan, 'Three Key Challenges in Public Interest Litigation' (Paper presented at the Victorian Bar Law Conference, Torquay, 5 March 2011). In addition, whether a defence based upon the public interest in freedom of the press, or the wider interest of freedom of expression, is available is arguably still at large.

information that is generally accessible and/or trivial), or if the action is transformed so as to effectively remove the requirement for an obligation of confidence, determining the nature and extent of the public interest defence to breach of confidence will be of critical importance. Indeed, in the United Kingdom, one of the consequences of using the traditional breach of confidence action to protect private information in its own right is uncertainty over whether different types of information should be treated differently depending on whether they can be described as confidential, using the 'old methodology', or whether they are more properly described as private.<sup>110</sup>

### *Remedies for Breach of Confidence*

An injunction may be granted to restrain the disclosure of confidential information where disclosure is apprehended, or in order to restrain further disclosure.<sup>111</sup> However, where information has already entered the public domain, even if this is by virtue of the defendant's breach of confidence, an injunction might be refused on the grounds that to grant one would be pointless and would even bring the administration of justice into disrepute.<sup>112</sup> The doctrine of futility in relation to injunctive relief is captured in the maxim 'equity will not act in vain'<sup>113</sup> and has been described as having 'a long pedigree' and being 'widely accepted.'<sup>114</sup> Nevertheless, in cases where information has entered the public domain as a result of a breach of confidence, an injunction will not automatically be considered futile.<sup>115</sup> In *Douglas v Hello! Ltd (No 2)* the Court of Appeal of England and

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<sup>110</sup> Nicole Moreham, 'Breach of Confidence and Misuse of Private Information: How do the Two Actions Work Together?' (2010) 15 *Media and Arts Law Review*.

<sup>111</sup> *Giller v Procopets* (2008) 24 VR 1, [150] (Ashley JA).

<sup>112</sup> See *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB) [36] where Eady J refused injunctive relief to restrain publication of material depicting the claimant on the basis that it was already 'so widely accessible that an order in the terms sought would make little practical difference'. See also *Australian Football League v The Age Company Ltd* (2006) 15 VR 419 (Kellam J) ('the AFL case') in which the plaintiffs sought a permanent injunction preventing the publication, in the defendant newspaper, of confidential information relating to the identity of any AFL player testing positive under the AFL's illicit drug policy. The defendant argued that the identity of the players had entered the public domain by virtue of publication on a number of internet sites, among other things, and that 'it would be entirely pointless, and indeed would bring the administration of justice into disrepute, for the court to endeavor to restrain the publication of matters which are well known by a large number of members of the public': [428].

<sup>113</sup> See, eg, *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 75 ALR 353, 398 (Kirby P citing the Vice-Chancellor (Sir Nicholas Browne-Wilkinson) in *Attorney-General v Guardian Newspapers Ltd* [1987] 1 WLR 1248 at 1269.

<sup>114</sup> Normann Witzleb, "'Equity Does Not Act in Vain": An Analysis of Futility Arguments in Claims for Injunctions' (2010) 32 *Sydney Law Review* 503, 506.

<sup>115</sup> See, eg, *Earl v Nationwide News Pty Ltd* [2013] NSWSC 839 (20 June 2013) [26], White J concluding that 'the principles concerning the deprivation of a plaintiff of an equitable remedy because the confidential information has passed into the public domain are not settled'. Accordingly, White J extended an interlocutory injunction which restrained the defendant from publishing details of the plaintiff's medical treatment, despite the fact that allegations of that treatment had been widely published by other news services: ([20] citing submissions of counsel for the defendant)]. See, also, *Douglas v Hello! Ltd (No 2)* [2006] QB 125 [105]: '[o]nce intimate personal information about a celebrity's private life has been widely published it may serve no useful purpose to prohibit further publication. The same will not necessarily be true of photographs. Insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when

Wales noted, on this very issue, an ‘important potential distinction between the law relating to private information and that relating to other types of confidential information.’<sup>116</sup> In the more recent decision of *PJS v News Group Newspapers Ltd* (‘PJS’), the UK Supreme Court drew an important distinction between an injunction to protect confidential (or secret) information and an injunction to protect private information, where publication of the material had already been widespread.<sup>117</sup> In the case of confidential or secret information, the court acknowledged that widespread publication of material, including online, may undermine the claim for grant of a permanent injunction.<sup>118</sup> By contrast, where the claim was based on respect for privacy and family life, even widespread publication would not necessarily render an injunction futile.<sup>119</sup> The court referred to a number of cases in which intrusion had been used to justify the grant of an injunction despite widespread publicity, and cited with approval a passage from the judgment of Tugendhat J in *CTB* commenting that the fact that ‘tens of thousands of people have named the claimant on the internet’ confirms rather than undermines the argument that ‘the claimant and his family need protection from intrusion into their private and family life’.<sup>120</sup> These decisions suggest that an Australian court would not necessarily regard an injunction as futile where the purpose is to protect a plaintiff’s privacy. However, it must be remembered that these decisions have occurred in the UK context and that, as noted above, the action for breach of confidence in Australia cannot be said to have been transformed in the same way as it has in the UK to become a fully-fledged action encompassing protection against the unauthorised disclosure of private information (at least not where information is considered generally accessible).<sup>121</sup> Accordingly, whether the same distinction between confidentiality and privacy would apply in considering whether to award a permanent injunction where publication of material is already widespread, cannot be confirmed.

Moreover, the posting of confidential information to the internet will not automatically result in the information being found to have entered the public domain. Rather the question of whether publication on the internet has caused information to enter the public domain is a question of fact

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each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph, is confronted by a fresh publication of it.’

<sup>116</sup> *Douglas v Hello! Ltd (No 2)* [2006] QB 125 [105].

<sup>117</sup> [2016] 4 All ER 554.

<sup>118</sup> *PJS* [2016] 4 All ER 554, 580 (Lord Neuberger, with whom Lady Hale, Lord Mance and Lord Reed agreed).

<sup>119</sup> *PJS* [2016] 4 All ER 554, 580-581 (Lord Neuberger, with whom Lady Hale, Lord Mance and Lord Reed agreed).

<sup>120</sup> *PJS* [2016] 4 All ER 554, 581 (Lord Neuberger, with whom Lady Hale, Lord Mance and Lord Reed agreed), citing Tugendhat J in *CTB* [2011] All ER (D) 227 (May).

<sup>121</sup> *Lenah* (2001) 208 CLR 199, 327 [329] (Callinan J).

## *Confidential Information and Internet Intermediaries*

In relation to images posted on the internet, an internet content host<sup>122</sup> cannot be liable in respect of confidential information posted on a web page it operates unless, at the very least, it was aware of the nature of the content. This is due to clause 91(1) of schedule 5 of the *BSA*, discussed in section 1 (common law action for invasion of privacy and internet intermediaries) above.

Thus, while it is clear that there can be no obligation of confidence imposed on an internet content host unless and until that host becomes aware of the nature of the content, the more difficult question is what type awareness on the part of the content host is required before the 'safe harbour' of clause 91(1) of schedule 5 will be lost. As discussed above (in section 1 — common law action for invasion of privacy) Leonard takes the view that awareness as to the existence of content rather than awareness that content is infringing is sufficient. However, this position is arguable where the confidential nature of the material is not readily apparent.<sup>123</sup>

Where an individual has requested that the site host remove images on the basis that they involve depictions or circumstances that would amount to confidential information, the failure to remove them may give rise to an action for breach of confidence.<sup>124</sup> Likewise, where a site host otherwise becomes aware or has been given constructive notice of the existence of confidential information.

Without the use or threatened use of information, however, it is likely that no action for breach of confidence will lie, in which case breach of confidence is entirely ineffective in restraining or remedying unwanted or surreptitious filming per se.<sup>125</sup>

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<sup>122</sup> As that term is defined in the *BSA* sch 5, cl 3: a 'person who hosts internet content in Australia.'

<sup>123</sup> By contrast, the confidential nature of information may be apparent because it is obvious that the information was captured surreptitiously or possibly, perhaps, because the nature of the information is such that it is 'easy to identify as private' (as per *Lenah* (2001) 208 CLR 199, 226 [42] (Gleeson CJ)).

<sup>124</sup> See, eg, *Sir Elton John and Ors v Countess Jolebine and Ors* [2001] MCLR 91 ('*Elton John*'). Commenting on *Elton John*, a legal writer with Pinsent Masons has written: 'it would appear that if an ISP becomes aware of material on its website and there is a risk that it was imparted in breach of confidence, the ISP has an obligation to discontinue access to the material. Correctly, this obligation only takes effect when the ISP becomes aware of the material, but becoming so aware is not dependent on some aggrieved party advising the ISP about the material which it considers confidential. The obligation applies as soon as the ISP becomes aware of the material by any means and if the ISP ought to consider there a risk that the material was imparted in breach of confidence': Pinsent Masons, '*Sir Elton v Countess Jol*' on *Out-Law.com* (undated) <<http://www.out-law.com/page-8694>>.

<sup>125</sup> See ALRC, *For Your Information: Australian Privacy Law and Practice*, Report no 108 (2008) vol 3, 2564 [74.114]. However, note here the Court of Appeal of England and Wales decision in *Tchengiz v Imerman* [2010] EWCA Civ 908 in which a breach of confidence action was made out in relation to the intentional obtaining of information even though there was no evidence of use or intended use. See also Nicole Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73(2) *Cambridge Law Journal* 350, 361 discussing this case, and *Jones v Tsigi* (2012) ONCA 32, 333 D.L.R. (4<sup>th</sup>) 566.

### 3 Defamation

The success of a defamation action depends upon the meanings ('imputations') conveyed by material being considered capable of being defamatory by reference to an objective standard (the hypothetical referee).<sup>126</sup> Only where the publication of an image is capable of affecting the image subject's reputation or standing is the publication likely to be considered capable of being defamatory. The impact of the publication of an image upon the image subject themselves is not relevant in determining this.<sup>127</sup> Where the plaintiff is a child it may be more difficult for them to establish that imputations are capable of being defamatory. For example, in *Saunders v Nationwide News Pty Ltd*,<sup>128</sup> an appeal was brought by a seven-year-old boy in respect of judgment entered against him in his defamation action against Nationwide News. The action had been brought by the boy in relation to a story identifying him and describing injuries he sustained as a result of setting himself on fire while sniffing petrol. The plaintiff alleged, inter alia, that this news report conveyed the imputation that he had committed the crime of petrol sniffing.<sup>129</sup> This was accepted by the jury, which went on, however, to find that the imputation was not defamatory of the plaintiff.<sup>130</sup> The appeal was dismissed and in the course of giving judgment Hunt AJA commented as follows:

Assuming, as it must be assumed, that the plaintiff here is alleged to have committed the crime of petrol sniffing, it was, in my view, clearly open to the jury to have found that the ordinary decent members of the community would not have thought any less of the plaintiff for having so acted, because of his immaturity.<sup>131</sup>

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<sup>126</sup> *Sungrature Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, 10–11 (Gibbs J), 22 (Mason J); *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [24, 25] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Gutnick*'); *Radio 2UE v Chesterton* (2009) 238 CLR 460, 468–9 [10]–[12] (French CJ, Gummow, Kiefel and Bell JJ) ('*Radio 2UE*').

<sup>127</sup> The High Court has recently suggested that 'the reference in the general test, as stated in *Sim v Stretch* [1936] 2 All ER 1237 to a person being "lowered in the estimation" of the hypothetical referee does not imply the exercise of a moral judgment' but simply conveys a 'loss of standing' in some respect: *Radio 2UE* (2009) 254 ALR 606, 616 [37] (French CJ, Gummow, Kiefel and Bell JJ). By reference to the other tests by which material may be judged to be defamatory — namely that the plaintiff is shunned and avoided or exposed to hatred, contempt and ridicule — it also seems to be accepted that no moral blame is required. Nevertheless, the imputations conveyed must be capable of giving rise to, and be such as to actually give rise to, a loss of standing: McColl JA, delivering a dissenting judgment in the Court of Appeal in *Radio 2UE* [2008] NSWCA 66 (17 April 2008) believed that the case of *Berkoff v Burchill* [1996] 4 All ER 1008, 1020 'underscores the proposition that even in the case of an imputation which exposes a person to ridicule, the Court was of the view that the plaintiff's standing ... or reputation ... had to be lowered before the imputation was capable of being defamatory': at [89]. Indeed, as Jill Cottrell has suggested: '[i]f ridicule is some sort of "free-standing" test of defamation, it is hard to see what it really protects other than the plaintiff's feelings': Jill Cottrell, 'What does "Defamatory" mean? Reflections on *Burkoff v Burchill*' [1998] *Tort Law Review* 149, 157.

<sup>128</sup> [2005] NSWCA 404 (16 November 2005).

<sup>129</sup> *Ibid* 1 [3].

<sup>130</sup> *Ibid* [4].

<sup>131</sup> *Ibid* 3 [13] (Hunt AJA).



An imputation that a person has given consent to the use of their image may also be actionable under defamation, particularly where, as in *Tolley v Fry*, the imputation was that the plaintiff had provided their consent for reward.<sup>132</sup> Nevertheless, Pannam has expressed the view that that imputation in itself will not necessarily damage the plaintiff's reputation: 'an ordinary individual is not lowered in the esteem of his fellows if it is thought he receives a fee from an advertisement'.<sup>133</sup>

Truth (or justification) is a defence to a defamation action so an authentic photograph that depicts a person as they *actually are* will only be considered defamatory if an argument can be sustained that the photograph conveys a meaning that is capable of being defamatory, and which is substantially untrue.<sup>134</sup> That meaning may be implied by the context (including the forum in which the image is published) or in other ways, such as by the addition of text and comments.<sup>135</sup> Where the meanings conveyed by an image are proven, on the balance of probabilities, to be substantially true then the effect of the defamatory imputations on the claimant is irrelevant, as is the existence of a malicious intent or the absence of a public interest justification.<sup>136</sup> This is clearly a major limitation on the utility of a defamation action in providing individuals with control over the publication of images of themselves. Therefore, the truth defence will present a barrier to success unless an image purports to be of the would-be plaintiff but is not;<sup>137</sup> has been doctored such that it cannot be said to portray or convey the truth;<sup>138</sup> is accompanied by

<sup>132</sup> *Tolley v J S Fry & Sons Ltd* [1930] 1 KB 467. See also *Ettingshausen* (1991) 23 NSWLR 443.

<sup>133</sup> Clifford L Pannam, 'Unauthorized Use of Names or Photographs in Advertisements' (1966) 40 *The Australian Law Journal* 4, 5.

<sup>134</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 135; *Defamation Act 2005* (NSW) s 25; *Defamation Act 2006* (NT) s 22; *Defamation Act 2005* (Qld) s 25; *Defamation Act 2005* (SA) s 23; *Defamation Act 2005* (Tas) s 25; *Defamation Act 2005* (Vic) s 25; *Defamation Act 2005* (WA) s 25. As to the common law defence of truth, see *Rofe v Smith's Newspapers* (1924) 25 SR (NSW) 4.

<sup>135</sup> See, eg, *Trkulja v Google Inc LLC* [2010] VSC 226 (3 November 2010). The plaintiff commenced proceedings for defamation in respect of a number of pages of web-based material containing images of the plaintiff and others who were known as members of the Melbourne criminal underworld, including one person who was described as a 'notorious convicted criminal, an alleged murderer and a drug trafficker': at [2]. The material also contained an article headed 'Shooting Probe Urged November 20, 2007': at [11]. The jury found one of the alleged imputations to have been conveyed by the material and to be defamatory of the plaintiff, namely that 'the plaintiff was so involved with crime in Melbourne that his rivals had hired a hit man to murder him': at [11]. This imputation did not arise from the photograph in and of itself, but rather from the totality of the web-based material complained of.

<sup>136</sup> In regards to the common law position, see *Rofe v Smith's Newspapers* (1924) 25 SR (NSW) 4. The statutory defence of truth is set out in the relevant legislation as follows: *Civil Law (Wrongs) Act 2002* (ACT) s 35; *Defamation Act 2005* (NSW) s 25; *Defamation Act 2006* (NT) s 22; *Defamation Act 2005* (Qld) s 25; *Defamation Act 2005* (SA) s 23; *Defamation Act 2005* (Tas) s 25; *Defamation Act 2005* (Vic) s 25; *Defamation Act 2005* (WA) s 25 ('the Uniform Defamation Legislation'). Prior to the Uniform Defamation Legislation, in order to rely on the truth defence, a plaintiff had to establish that publication was also for the public benefit and, in NSW, had also to prove that publication was in the public interest or was published on occasion of qualified privilege: *Civil Law (Wrongs Act) 2002* (ACT) s 59 (repealed); *Defamation Act 1974* (NSW) s 15 (repealed); *Defamation Act 1889* (Qld) s 15 (repealed); *Defamation Act 1957* (Tas) s 15 (repealed).

<sup>137</sup> See, eg, Nick Leys, 'Pauline Hanson Photo Fraud', *Herald Sun* (online), 22 March 2009 <<http://www.heraldsun.com.au/news/victoria/hanson-photo-fraud/story-e6frf7kx-1225692406741>>.

<sup>138</sup> See, eg, this news story about an American schoolgirl suing her classmates for libel over a fake Facebook profile, which included a doctored photograph of her: 'Ga. Girl, 14, Sues Bullies for Libel Over Fake Facebook

text or sounds that convey an untrue defamatory imputation;<sup>139</sup> or where the context imputes an untrue defamatory meaning to the picture.<sup>140</sup>

Even where a defamation action is made out by the publication of images of a person, the action is of limited use in preventing publication, as free speech concerns mean that the balance of convenience rarely comes down in favour of the grant of an interlocutory injunction restraining publication.<sup>141</sup> Nevertheless, where the action is made out the successful plaintiff is likely to secure an undertaking or injunctive relief providing for removal of the defamatory matter from publication by the person or persons responsible for publication.<sup>142</sup>

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Profile', *CBS News/Crimesider* (online), 2 May 2012 <[http://www.cbsnews.com/8301-504083\\_162-57426001-504083/ga-girl-14-sues-bullies-for-libel-over-fake-facebook-profile/](http://www.cbsnews.com/8301-504083_162-57426001-504083/ga-girl-14-sues-bullies-for-libel-over-fake-facebook-profile/)>.

<sup>139</sup> See, eg, *Ettingshausen* (1991) 23 NSWLR 443; *Shepherd v Walsh* [2001] QSC 358 (6 September 2001).

<sup>140</sup> See, eg, Jeff Sonderman, 'News Orgs Circulate Facebook Profile, Photos of Man Who Wasn't the Shooter', *Poynter.org* (online), 14 December 2012 <http://www.poynter.org/2012/news-orgs-circulate-facebook-profile-of-the-wrong-ryan-lanza/198262/>; see also Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law* (Allen & Unwin, 5<sup>th</sup> ed, 2015) 224 referring to *Finn v Queensland Newspapers Pty Ltd* [2002] 181 (20 May 2002) in which a photograph of John Finn was published accidentally next to a story about a conman who shared the same name.

<sup>141</sup> *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 67 [32] (Gleeson CJ and Crennan J): 'It is one thing for the law to impose consequences, civil or criminal, in the case of an abuse of the right of free speech. It is another matter for a court to interfere with the right of free speech by prior restraint.' In *Jakudo Pty Ltd v South Australian Telecasters Ltd* (Unreported, Supreme Court of South Australia Full Court, Doyle CJ, Williams and Belby JJ, 15 October 1997), 3 referring to judgment of Mason ACJ in *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153, Doyle CJ outlined three basic questions that the court will need to be satisfied of before an interlocutory injunction is granted, namely that: 'the plaintiff has shown that there is a serious question to be tried as to the plaintiff's entitlement to relief, has shown that the plaintiff is likely to suffer injury for which damages will not be an adequate remedy, and has shown that the balance of convenience favours the granting of an injunction.'

<sup>142</sup> Courts will generally regard a final injunction as appropriate where damages or other available remedies would be inadequate in the circumstances: I C F Spry, *Equitable Remedies: Injunctions and Specific Performance* (The Law Book Company Limited, 1971) 346. However, it has been said that in practice damages are frequently not considered adequate to remedy tortious wrongs and that final injunctive relief should be available: Inns of Court School of Law, *Remedies 1999/2000* (Blackstone Press Limited, 4<sup>th</sup> ed, 1999) 58. But cf *Dabrowski v Greeuw* [2014] WADC 175 (22 December 2014) [299] Bowden DCJ observing that '[i]n any event I am satisfied that if there was [sic] any further defamatory posts, damages would be an adequate remedy.' Nevertheless, Trinidad and Cane note that the award of final injunctions in defamation actions is rare, given that an undertaking to the court not to republish the defamatory matter will usually be given by the defendant, thereby avoiding the need for an injunction: Francis Trinidad, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (Oxford University Press, 4<sup>th</sup> ed, 2007) 418. In the internet era, an interesting question arises, however, as to whether ongoing publication of defamatory material, such as a defamatory newspaper report accessible in an online news archive, should be restrained by an injunction. In *Times Newspapers Ltd v. the United Kingdom (nos 1 and 2)* (European Court of Human Rights, Chamber, Application Nos 3002/03 and 23676/03, 10 June 2009) [47] the European Court of Human Rights ('ECtHR') held that, in the context of a complaint pursued by a newspaper in relation to its right to freedom of expression under Article 10 of ECHR, the requirement to publish an 'appropriate qualification' to an article contained in an internet archive managed by the newspaper, where the article was known to be defamatory, would not violate its right to freedom of expression in accordance with Article 10 ECHR. The ECtHR commented, with approval, that it was 'noteworthy that the Court of Appeal did not suggest that potentially defamatory articles should be removed from archives altogether': *Times Newspapers Ltd v. the United Kingdom (nos 1 and 2)* (European Court of Human Rights, Chamber, Application Nos 3002/03 and 23676/03, 10 June 2009) [47]. But see Dominic McGoldrick, 'Developments in the Right to be Forgotten'

On the other hand, the ease by which material can be copied and republished on the internet means that the practical utility of a legal action for defamation is necessarily limited by the cost and jurisdictional challenges of bringing an action against all those responsible for publication or, in the case of internet intermediaries, liable for publication by omission.

### *Defamation and Internet Intermediaries*

The liability of internet intermediaries for defamatory content uploaded or posted by another is a developing area of law and has been described as unsettled.<sup>143</sup> Reviewing the complexities of the question of intermediary liability is beyond the scope of this thesis, as is consideration of the question of whether and if so in what circumstances intermediaries should be liable in respect of defamatory matter posted by another.<sup>144</sup> In short, however, internet intermediaries have been held liable for defamation even where publication occurs by omission — that is, without any intention to assist in the act of publication.<sup>145</sup> As noted by Rolph, the trend of recent authorities on the question of whether internet intermediaries should be regarded as publishers ‘appears, for now, to favour plaintiffs’.<sup>146</sup> Accordingly, a person who has been defamed by way of an image theoretically has greater control over their image than would be the case if the would-be defendant was confined to the person posting or uploading the image. The ability to sue an intermediary is particularly important where the plaintiff wishes to secure removal of material from publication and is unable to identify the person responsible for initially posting the material. It is also important where the plaintiff finds that the material has been broadly disseminated across a particular platform, such as is the case where a photograph on Facebook, for example, is copied and reposted to other pages within the site. Nevertheless, the practical utility of such an action is limited by the difficulty in enforcing injunctive remedies against those located outside of Australia.<sup>147</sup> Moreover, internet

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(2013) 13(4) *Human Rights Law Review* 761, 775 who writes that it is nevertheless ‘possible that the secondary liability of the search engine providers under national law may lead to duties amounting to blocking access to third-party websites with illegal content such as web pages infringing intellectual property rights or displaying libellous or criminal information.’

<sup>143</sup> David Rolph, ‘Defamation by Social Media’ (Legal Studies Research Paper No 13/81, Sydney Law School, 2013) 5; Ryan J Turner, ‘Internet Defamation Law and Publication by Omission: A Multi-Jurisdictional Analysis’ (2014) 37(1) *UNSW Law Journal* 34, 34 citing a number of cases (references to which are here omitted).

<sup>144</sup> For a recent review of intermediary liability, see generally Turner, above n 143; see also Rolph, ‘Defamation by Social Media’, above n 143, 1. See also David Rolph, ‘Publication, Innocent Dissemination and the Internet after *Dow Jones & Co Inc v Gutnick*’ (2010) 33 *University of New South Wales Law Journal* 562.

<sup>145</sup> Turner, above n 143, 36 citing *Webb v Bloch* (1928) 41 CLR 331.

<sup>146</sup> Rolph, ‘Defamation by Social Media’, above n 143, 1.

<sup>147</sup> In *Gutnick* (2002) 210 CLR 575 [44] (Gleeson CJ, McHugh, Gummow and Hayne JJ) the High Court held that ordinarily the place where the tort of defamation is committed will be the place that material is downloaded from the internet, as that is the place where damage to reputation may be done. Nevertheless, as Richardson and Garnett point out, ‘the limited prospects that currently exist to enforce injunction remedies in foreign jurisdictions mean a judgment obtained in one jurisdiction may be virtually ineffective

intermediaries are not required to actively monitor content in order to determine whether it is defamatory and, as noted in the previous section, cannot be held liable unless and until they are aware of the nature of the content in question.<sup>148</sup>

#### 4 *Injurious Falsehood*

In order to establish the common law tort of injurious falsehood a plaintiff must prove that there has been malicious publication of a false statement concerning the plaintiff's goods or business that results in actual damage.<sup>149</sup>

An action for injurious falsehood is unlikely to assist a plaintiff in obtaining a remedy for the unauthorised publication of an image of themselves unless the plaintiff can show that the publication affected their business or commercial interests.<sup>150</sup> Like an action for passing off, discussed next, injurious falsehood is essentially an action that protects economic rather than personal or dignitary interests.

#### 5 *Passing Off*

In Australia the tort of passing off can be used to provide redress where there is a misrepresentation of an association between the plaintiff and the goods, services or business of the defendant. The misrepresentation at the heart of a passing off action can take various forms, including the use of a person's name,<sup>151</sup> image,<sup>152</sup> or visual

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elsewhere': Megan Richardson and Richard Garnett, 'Perils of Publishing on the Internet: Broader Implications of *Dow Jones v Gutnick*' (2004) 13(1) *Griffith Law Review* 90.

<sup>148</sup> BSA sch 5, cl 9(1).

<sup>149</sup> *Ratcliffe v Evans* [1892] 2 QB 524 at 527–8 (Bowen LJ).

<sup>150</sup> *Swimsure (Laboratories) Ltd v McDonald* [1979] 2 NSWLR 796, 801 (Hunt J); *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 694 (Gleeson CJ); *Palmer-Bruyn & Parker* (2001) 268 CLR 388, 406 (Gummow J). False statements concerning an individual plaintiff's personal reputation have formed the basis for successful claims of injurious falsehood where the claims have resulted in damage to the plaintiff's business or trade (see, eg, *Dye v Commonwealth* [2012] FCA 242 (16 March 2012) 215 [664] (Buchanan J): 'there are cases where a person, whose profession or business depends upon their personal standing in the community or in the world of business or in their own profession, may claim damages for an injury to their trade or business arising from a maliciously false statement made about them') and even where the damage has been to an individual in the pursuit of their career (*Noye v Robbins* [2007] WASC 98 (30 April 2007)). Although there have been suggestions to the contrary on the part of academic commentators (see, eg, Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts*, (Thomson Reuters, 10<sup>th</sup> Edition, 2011) 795,795 [30.230]), and judicial reference to interesting but unresolved questions as to the extent to which the tort extends beyond concepts of business or property (see, eg, *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 692–3 (Gleeson CJ); *Palmer-Bruyn and Parker Pty Ltd v Parsons* 208 CLR 388, 393 [1] (Gleeson CJ), 407 [60] Gummow J), Australian courts have generally been reluctant to accept that injurious falsehood can extend beyond the protection of business or commercial interests. In *Dye v Commonwealth* [2012] FCA 242 (16 March 2012), 215 [664], Buchanan J was adamant that the plaintiff not be allowed to pursue her claim for injurious falsehood: 'Ms Dye was not pursuing a trade or business in the sense contemplated by those cases. She was an employee in a large organisation at a relatively junior level. No property or commercial or business interest of the kind necessary for this tort was pleaded, much less established. Ms Dye sold no product, had no custom to be lost, had no professional practice to be injured and had no business to be damaged. In my view, this cause of action was misconceived from the outset'.

<sup>151</sup> See, eg, *Fitzgerald & Anor v 33 South Pty Ltd & Anor* [2008] FMCA 1132 (13 August 2008) ('Fitzgerald').

<sup>152</sup> See, eg, *Henderson v Radio Corp* (1960) SR NSW 576 ('Henderson'); *Fitzgerald* [2008] FMCA 1132 (13 August 2008).

'likeness'.<sup>153</sup> The elements of the action were laid out by Lord Diplock in *Erven Warninck Besloten Vennootschap v J. Townend & Sons (Hull) Limited*, as follows:

(1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate customers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader ...<sup>154</sup>

Reference to the business or goodwill of a trader has been interpreted broadly to include the commercial reputation of a person engaged in various fields of activity, including professional and artistic and literary endeavours.<sup>155</sup> It is clear, however, that the reputation the plaintiff claims is being taken advantage of must be commercially valuable or must amount to a 'saleable commodity'.<sup>156</sup> McLelland has argued that every person's reputation is conceivably 'saleable',<sup>157</sup> but Gummow (writing before he was appointed to the judiciary), commenting on the case of *Henderson v Radio Corp*,<sup>158</sup> has written that there is 'no suggestion that, absent such a saleable commodity in a capacity for sponsorship, any citizen can protest as passing off the commercial exploitation of his name without consent, for it is his pre-existing notoriety from which derives his saleable commodity'.<sup>159</sup> This is, as Gummow goes on to note, because in Australia the tort of passing off does not aim to protect privacy per se, but rather a business or commercial goodwill.<sup>160</sup> Thus, while privacy and publicity have been described as closely related concepts,<sup>161</sup> passing off is essentially an economic tort, designed to protect the pecuniary interests that arise from a person's reputation, rather than a person's dignitary interests or personal autonomy.<sup>162</sup> As such, it is not an action that can be used to protect against

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<sup>153</sup> *Hogan v Koala Dundee* (1988) 83 ALR 187; *Pacific Dunlop Limited v Hogan* (1989) 87 ALR 14.

<sup>154</sup> *Erven Warninck BV v J. Townend & Sons (Hull) Limited* [1979] 2 All ER 927, 932.

<sup>155</sup> Sappideen and Vines, above n 150, 804 n 314.

<sup>156</sup> See *Henderson* (1960) SR NSW 576, 603 (Manning J); *Fitzgerald* [2008] FMCA 1132 (13 August 2008) [78] (Nicholls FM); W M C Gummow, 'Carrying on Passing Off' [1973–6] 7 *Sydney Law Review* 224, 226; *Ibid.*

<sup>157</sup> H H McLelland, 'New Horizons of Passing Off' (1961) 3 *Sydney Law Review* 525, 532.

<sup>158</sup> (1960) SR NSW 576.

<sup>159</sup> Gummow, above n 156, 226.

<sup>160</sup> *Ibid.*

<sup>161</sup> See Olaf Weber, 'Human Dignity and the Commercial Appropriation of Personality: Towards a Cosmopolitan Consensus in Publicity Right?' (2004) 1(1) *SCRIPT-ed* 160, 161 <<http://www.worldlii.org/int/journals/lsn/abstracts/1137643.html>>.

<sup>162</sup> See, eg, conclusions of Evatt CJ and Myers J in *Henderson* (1960) SR NSW 576, 595 stating 'the wrongful appropriation of another's professional or business reputation is an injury in itself, no less, in our opinion, than the appropriation of his goods or money. The professional recommendation of the respondents was and still is theirs, to withhold or bestow at will, but the appellant has wrongfully deprived them of their rights to do so and of the payment or reward on which ... they could have insisted.'

unauthorised publication of image per se, regardless of whether the effect of the publication is harmful to one's personal reputation or constitutes an invasion of privacy.<sup>163</sup>

## 6 *Actions under the Australian Consumer Law*

A statutory action for misleading or deceptive conduct or misleading or deceptive representations will usually present an alternative cause of action to passing off. The *Australian Consumer Law* ('ACL') provides that 'a person shall not, in the course of trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.'<sup>164</sup> Each state and territory applies the ACL as a law of that jurisdiction.<sup>165</sup> As with the *Trade Practices Act 1974* (Cth) before it, the ACL contains no definition of the term 'misleading or deceptive', leaving interpretation of it to the courts. Whether conduct is misleading or deceptive is a question of fact to be determined by reference to all relevant facts and circumstances of the case.<sup>166</sup>

An important difference, superficially at least, between the common law action for passing off and an action for misleading or deceptive conduct (or representations) under the ACL<sup>167</sup> is that in order to bring an action under the statute there is no need to show an established reputation or goodwill: the emphasis is on the effect of the conduct upon the market (consumers and potential consumers).<sup>168</sup>

Theoretically then, it should be possible for anyone, regardless of celebrity, to make use of the statutory action where the use of their image by another amounts to misleading or deceptive conduct or representations. However, Catanzariti believes that it 'it is difficult for a person to establish that conduct is misleading or deceptive unless the person is

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<sup>163</sup> See, eg, Weber, above n 161, 189. See also Therese Catanzariti, 'Swimmers, Surfers and Sue Smith: Personality Rights in Australia' 2002 13(7) *Entertainment Law Review* 135, 135; McLelland, above n 157159, 525.

<sup>164</sup> *Competition and Consumer Act 2010* (Cth) sch 2 (ACL), s 18(1). See also ACL s 29: false and misleading representations relating to goods or services and ACL s 151: criminal offences regarding false and misleading representations relating to goods or services.

<sup>165</sup> *Fair Trading (Australian Consumer Law) Act 1992* (ACT) s 7; *Fair Trading Act 1987* (NSW) s 28; *Consumer Affairs and Fair Trading Act 1990* (NT) s 27; *Fair Trading Act 1989* (Qld) s 16; *Fair Trading Act 1987* (SA) s14; *Australian Consumer Law (Tasmania) Act 2010*, s 6; *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 8; *Fair Trading Act 2010* (WA) s 19(2).

<sup>166</sup> *Re Taco Company of Australia Inc; Taco Bell v Taco Bell Pty Ltd* (1982) 42 ALR 177, 199–200 (Deane & Fitzgerald JJ) ('*Taco Bell*').

<sup>167</sup> ACL, s 18(1), 29.

<sup>168</sup> In considering the relationship between the misleading or deceptive conduct provisions of the *Trade Practices Act 1974* (Cth) s 52 (the equivalent of which provision is now to be found in the ACL s 18(1)) Franki J in *Taco Bell* (1982) 42 ALR 177, 183 citing with approval similar observations of Stephen J in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, 227 ('*Hornsby*'), noted that: '[I]t is clear that the purpose of s52 is that of consumer protection and therefore questions of goodwill or damage to an applicant are ... unlikely to be of critical importance in deciding whether an action to restrain conduct, which would be in contravention of s52, should succeed.'

sufficiently famous that the public would assume that the person would licence the use of their image, so that the use of their image suggests that a licence in fact exists.<sup>169</sup>

In considering whether conduct or representations are misleading or deceptive, courts have noted that it is 'of particular importance to identify the respect in which there is said to be any misleading or deception.'<sup>170</sup> In particular, Lockhart J, in the course of giving judgment in *Lumley Life Ltd v IOOF of Victoria Friendly Society*, observed that where people are led into error, the error must not be 'commercially irrelevant'.<sup>171</sup> This is in keeping with the primary object of the legislation, which is, as noted above, the protection of consumers.<sup>172</sup> This should mean that it is possible for non-celebrities to utilise the statutory action wherever a commercially relevant error has been induced by the use of their image. Hence it will amount to misleading or deceptive conduct to use names or images of individuals, celebrities or otherwise, in promotions and advertisements if that use constitutes a false testimonial.<sup>173</sup> The success of the action for misleading or deceptive conduct (or representations) relating to the use of another's image should also not depend on there being any misrepresentation as to a *commercial arrangement* between the subject of the image and the person or organisation making use of it.<sup>174</sup> What is important is whether public perception can be influenced to more favourably regard a product, business or organisation on the basis that it is being recommended by others. Nevertheless, it is true to say that the use of a celebrity name or image is probably more likely to influence the perception of the relevant section of the public than use of a non-

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<sup>169</sup> See also Susan M Crennan, 'The Commercial Exploitation of Personality' (1995) 8 *Australian Intellectual Property Law Bulletin* 129, 131 in which Crennan (writing before her appointment to the judiciary) observed that the wrongful appropriation of personality could only be restrained under the statutory action for misleading or deceptive conduct where a 'significant section of the public would be misled into believing, contrary to fact, that a *commercial arrangement* had been concluded between ... a celebrity ... and a defendant or respondent, under which the plaintiff or applicant agreed to the use of the indicia of personality for advertising purposes' (emphasis added). See also Arts Law Centre of Australia, *Unauthorised Use of Your Image*, Arts Law Information Sheet (24 May 2013) <<http://www.artslaw.com.au/info-sheets/info-sheet/unauthorised-use-of-your-image/>>, suggesting that the 'mere use of a person's image is unlikely to be found to mislead or deceive ... unless that person is a celebrity or well-known endorser of products.'

<sup>170</sup> *Hornsby* (1978) 140 CLR 216, 228 (Stephen J), cited with approval in *Taco Bell* (1982) 42 ALR 177, 201 (Deane and Fitzgerald JJ).

<sup>171</sup> *Lumley Life Ltd v IOOF of Victoria Friendly Society* (1990) ATPR 40-987, 50, 838, as referred to in *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* [1999] FCA 1821 at 14 [51] (French, Heerey and Lindgren JJ). The commercial relevance of the error goes to the question as to whether there is sufficient causal connection between the conduct and the consumer's state of mind: *SAP Australia Pty Ltd v Sapient Australia Pty Ltd* [1999] FCA 1821 at 14 [51] (French, Heerey and Lindgren JJ). See also *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 1572 (8 November 2000), [64] (French J).

<sup>172</sup> *Competition and Consumer Act 2010* (Cth) s 2. See also *Taco Bell* (1982) 42 ALR 177, 183 (Franki J) citing Stephen J in *Hornsby* (1978) 140 CLR 216: '[I]t is clear that the purpose of s52 is that of consumer protection and therefore questions of goodwill or damage to an applicant are...unlikely to be of critical importance in deciding whether an action to restrain conduct, which would be in contravention of s52, should succeed.'

<sup>173</sup> Australian Competition and Consumer Commission, *ACCC: Removalist Admits Publishing False Testimonials* (2011) <<http://www.accc.gov.au/media-release/accc-removalist-admits-publishing-false-testimonials>>. Cf Crennan, above n 169.

<sup>174</sup> Cf Crennan, above n 169, 131.

celebrity image, and will almost certainly be a relevant consideration in considering whether the conduct or representation in question is, in fact, misleading or deceptive.

It is also likely to be more difficult to establish that a section of the community has been misled or deceived where the only basis of the alleged misleading or deceptive behaviour in relation to the use of an image is that there has been a misrepresentation that the image subject has consented to the use of the image (as distinct from any representation that they the image subject has endorsed or approved of a business, product, service or message). In *Talmax Pty Ltd v Telstra Corporation Ltd*, the plaintiff, Australian swimmer Kieren Perkins, alleged (among other things) that the use of his image in an advertisement implied that he had given permission for his name and image to be so used and that this amounted to misleading or deceptive conduct within the meaning of the statutory prohibition.<sup>175</sup> The trial judge reasoned that:

Anyone who inferred that Talmax or Perkins had allowed the name and image to be used must have reasoned or assumed either that Telecom was not in law entitled to have published the article and photo without consent; or that, consistently with ordinary or proper practice, Telecom would not have done so; or that, in all the circumstances, the text implied permission.<sup>176</sup>

The trial judge went on to hold:

[a] reader who took it that Telecom was legally obliged to obtain consent to use the name and image of Perkins in the advertisement — one which did not amount to an endorsement — would have proceeded on a belief about the law which, as things stand, is erroneous. Such a mistake could not convert the article into conduct contravening s. 52.<sup>177</sup>

The plaintiff was unsuccessful at trial but on appeal the trial judge's findings were reversed.<sup>178</sup> The appeal court did, however, find that as a whole the material gave the impression that the appellant had consented to it,<sup>179</sup> although commented that the misrepresentation as to consent was of somewhat 'less importance' than the misrepresentations as to a commercial arrangement between the parties.<sup>180</sup>

Where the plaintiff is a non-celebrity, however, it is likely that any misrepresentation as to consent to use of image will be considered commercially irrelevant. This is on the basis that any such misrepresentation will be unlikely to influence the relevant section of the public in their perception of the product, service or organisation in question (at least

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<sup>175</sup> [1996] QSC 34 (14 March 1996) ('*Talmax*').

<sup>176</sup> *Ibid* 8 (Byrne J).

<sup>177</sup> *Ibid* (references omitted). On the relationship between an erroneous belief and misleading or deceptive conduct see *Campomar Sociedad Limited v Nike International Limited* (2000) 202 CLR 45, 83–7 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

<sup>178</sup> *Talmax* [1997] 2 Qd R 444.

<sup>179</sup> *Ibid* 451 (Fitzgerald P, Davies JA, Moynihan J).

<sup>180</sup> *Ibid*.



where there is no representation that the person somehow endorses or approves of that product, service or organisation). Accordingly, while there may be a misrepresentation conveyed as to consent of the image subject, that misrepresentation is unlikely to be considered misleading or deceptive in a way that contravenes statutory consumer protection provisions.

In summary, a statutory action for misleading or deceptive conduct (or representations) may succeed where the use of an image misrepresents some form of endorsement by or approval of the person in the image of a particular product, service or organisation. In endorsement cases, celebrity plaintiffs are more assured of success than non-celebrity plaintiffs because their perceived support or endorsement is able to influence the perception of the relevant section of the public, and is likely to be considered commercially relevant. However, as has been noted, celebrity is not a pre-requisite where the representation amounts to a false testimonial. Further, individuals may be able to succeed in establishing that use of their image without consent — even where that does not amount to an endorsement — is misleading or deceptive; however, it is suggested that such situations will be rare.

## 7 *Intentional Infliction of Harm*

Where a person intends to and does inflict harm on another, including by way of the use or threatened use of that other's image, it is possible that an action would lie for the tort of intentional infliction of harm. The tort of intentional infliction of harm is usually traced back to the English case of *Wilkinson v Downton*, where Justice Wright held that it was unlawful to act in a manner calculated to cause physical harm to another.<sup>181</sup> However, as one commentator has observed, the case was concerned only indirectly with physical harm and its 'real significance lay in the fact that it was the first case in which an English court offered redress for the intentional infliction of purely mental harm.'<sup>182</sup> There have been suggestions from the judiciary and commentators alike that *Wilkinson* was but a 'creature of its time'<sup>183</sup> and that it 'does not have a leading role in modern law'.<sup>184</sup> These observations are made on the basis of a view that the action may have been largely 'subsumed under the unintentional tort of negligence'<sup>185</sup> which allows recovery for pure mental harm.<sup>186</sup>

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<sup>181</sup> [1897] 2 QB 57, 58–59 (*'Wilkinson'*).

<sup>182</sup> Christian Witting, 'Tort Liability for Intended Mental Harm' (1998) 21(1) *University of New South Wales Law Journal* 55, 55.

<sup>183</sup> Butler, above n 59, 367.

<sup>184</sup> *Wainwright v Home Office* [2003] 4 All ER 969, 980 [41] (Lord Hoffman).

<sup>185</sup> *Magill v Magill* (2006) 226 CLR 551, 589 (Gummow, Kirby and Crennan JJ).

<sup>186</sup> This cause of action is discussed further in section 8 of this part, below. In *New South Wales v Lepore* (2003) 212 CLR 511, 602–3 [270] Gummow and Hayne JJ remarked that 'negligently inflicted personal injury to the person can, in at least some circumstances, be pleaded as trespass to the person, but the intentional infliction of harm cannot be pleaded as negligence.' That was not the view of McHugh J, however (*New South Wales v Lepore* (2003) 212 CLR 511, 572) and Peter Handford has argued that Australian courts have

Nevertheless, an important limitation of an action for intentional infliction of harm action in providing a person with the ability to control the publication or use of images of themselves is the need to demonstrate physical harm or a recognised psychiatric injury.<sup>187</sup> Because harm is a prerequisite of the action, it cannot be used proactively to prevent the unauthorised publication or dissemination of images, even if the likely consequence of that publication or dissemination would be compensable physical or mental harm.<sup>188</sup>

Another limitation is the requirement that the infliction be intentional. In *Wilkinson*, Wright J held that the tort was made out where the defendant had ‘wilfully done an act calculated to cause physical harm to the plaintiff ... and has in fact thereby caused harm to her.’<sup>189</sup> However, Wright J also found that intention could be ‘imputed’ to the defendant where the defendant’s act was ‘so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant’.<sup>190</sup> The question as to what constitutes intention for the purposes of the tort of intentional infliction of harm has proven difficult to answer definitively. It has been suggested that Wright J’s concept of imputed intention ‘sailed as close to negligence as he felt he could go.’<sup>191</sup> In *Nationwide News v Naidu*, however, Spigelman CJ observed that ‘something substantially more certain’ than the reasonable foreseeability of psychiatric injury was required to satisfy the requirement that the defendant’s act was ‘calculated’ to produce some effect of the kind that was produced.<sup>192</sup> While it was clear that an actual

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now recognised that the tort of negligence ‘has a role to play in cases of harm inflicted deliberately’: Peter Handford, ‘Intentional Negligence: A Contradiction in Terms?’ (2010) 32(29) *Sydney Law Review* 29. It may also be that a ‘Wilkinson tort’ will assume greater significance in cases where intentional torts are exempted from the provisions of civil liability legislation, including those imposing liability thresholds and caps: See, eg, *Nationwide News v Naidu* (2007) 71 NSWLR 471 [70] (Spigelman CJ) (*‘Naidu’*); Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 2<sup>nd</sup> Edition, 2010) 152; Peter Handford, ‘Intentional Negligence: A Contradiction in Terms?’ (2010) 32(29) *Sydney Law Review* 29, 31.

<sup>187</sup> *Habib v Commonwealth of Australia (No 2)* [2009] FCA 228 (13 March 2009) [26] Perram J; *Naidu* (2007) 71 NSWLR 471 [73] (Spigelman CJ). In *Giller* (2008) 24 VR 1, 35 the plaintiff was ultimately unsuccessful in her claim for intentional infliction of emotional harm, being one of the causes of action relied upon in relation to the distribution and threatened distribution by the defendant of videotapes showing the plaintiff and defendant engaged in sexual activity. Ashley JA was of the view that the plaintiff could not succeed in the action because she had not suffered a recognised psychiatric injury: at 35 [164]. However, Maxwell P: at 6 [7], with limited support from Neave JA: at 112 [471], was of the view that there was no bar to the common law development of an action for intentional infliction of emotional distress, where that distress fell short of a recognised psychiatric injury. While Maxwell P positively favoured the development of such an action at common law: at 6 [7], Neave JA believed that if such a tort was to be recognised, the legislature would be better placed than the judiciary to fill the gap: at 113-4 [475]–[476].

<sup>188</sup> Although note Penelope Watson, ‘Searching the Overfull and Cluttered Shelves’ (2004) 23 *University of Tasmania Law Review* 264, 290 who comments that ‘the UK Court of Appeal has demonstrated a willingness to grant injunctions based on ‘obvious risk’ of future illness’. These comments are based on the ruling in *Khorasandjian v Bush* [1993] QB 727, which (although since overruled on the basis that a cause of action in private nuisance should not apply where the plaintiff has no relevant proprietary interest) is still applicable in respect of the *Wilkinson* aspects of the decision.

<sup>189</sup> *Wilkinson* [1897] 2 QB 57, 58.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Wainwright v Home Office* [2003] 4 All ER 969, 981 [44] (Lord Hoffman), references omitted.

<sup>192</sup> *Naidu* (2007) 71 NSWLR 471 [76] (Spigelman CJ).

subjective intention was not required, what actually was required had not, in Spigelman J's view, been determined authoritatively.<sup>193</sup> Nevertheless, it was Spigelman J's view that 'reckless indifference' would satisfy the requirement of intention. Recently the Supreme Court of the UK has considered the mental element of the *Wilkinson* tort and determined that recklessness is insufficient and that the mental element is 'intention to cause physical harm or severe mental or emotional distress'.<sup>194</sup> Further, intention imputed on the basis of law – that is, on the basis that the harm was a likely consequence – was a 'vestige of a previous age and has no proper role in the modern law of tort.'<sup>195</sup>

Commenting on the usefulness of the *Wilkinson* tort in remedying invasions of personal privacy, the NSWLRC concluded that it would 'at most ... seem capable of applying to invasions of privacy that are deliberate and, perhaps, possess some element of vindictiveness.'<sup>196</sup> As Des Butler has observed, where the complaint relates to the publication of images by the media the plaintiff is 'likely to be confronted with the argument that the defendant's intention was to cover the story, rather than inflict harm on the plaintiff.'<sup>197</sup>

Therefore, the utility of a cause of action for intentional infliction of harm in remedying the unwanted publication or use of images must be considered limited. This is because of the need to establish recognised psychiatric harm, beyond emotional distress, humiliation and embarrassment, and the need to establish the requisite intention on the part of the party inflicting the mental harm.

## 8 *Negligent Infliction of Harm*

An action in negligence will lie where the defendant is in breach of a duty of care owed to the plaintiff and where that breach is a cause of compensable damage that is not too remote a consequence of the negligent act or omission.<sup>198</sup> It is now well established in common law that, for the purposes of a negligence action, pure mental harm<sup>199</sup> is compensable, but mental harm that does not amount to a recognised psychiatric illness or injury is not a basis of recovery.<sup>200</sup> Overlaying the common law position, civil liability legislation in six jurisdictions provides that there is no duty of care on the part of a person (a defendant) to take care not to cause mental harm to another, unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care were not taken ('the normal

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<sup>193</sup> Ibid [79] (Spigelman CJ).

<sup>194</sup> *O (A Child) v Rhodes* [2016] AC 219, 254 [87] (Baroness Hale and Lord Toulson).

<sup>195</sup> Ibid [81] (Baroness Hale and Lord Toulson).

<sup>196</sup> NSWLRC, Consultation Paper, above n 36, 53 [2.76].

<sup>197</sup> Butler, above n 59, 365.

<sup>198</sup> See, eg, *Gala v Preston* (1991) 172 CLR 243, 257–9 (Brennan J).

<sup>199</sup> In *Jaench v Coffey* (1984) 155 CLR 549, 593 Deane J referred to 'mere psychiatric injury' as 'psychoneurosis and mental illness which is not the adjunct of ordinary bodily injury to the person affected.'

<sup>200</sup> *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 394–5 (Windeyer J); *Tame v New South Wales* (2002) 211 CLR 317, 382 [193] (Gummow and Kirby JJ), 417–18.

fortitude test’).<sup>201</sup> In Victoria the normal fortitude test applies only in respect of pure mental harm,<sup>202</sup> whereas in the other five jurisdictions the legislation stipulates a ‘normal fortitude test’ in respect of *any* mental harm (defined as ‘impairment of a person’s mental condition’<sup>203</sup>) incurred by the prospective plaintiff.<sup>204</sup> However, each of these jurisdictions also provides that the limitations on the duty of care imposed by the normal fortitude test will or may not apply where the defendant knows or should have known that the plaintiff is a person of less than normal fortitude.<sup>205</sup> Furthermore, civil liability legislation in five of the preceding six jurisdictions places an explicit limitation on recovery of damages where the pure mental harm does not amount to a recognised psychiatric illness.<sup>206</sup>

The concept of ‘normal fortitude’ as a control mechanism of liability for pure mental harm also exists under common law. Whether the normal fortitude test is satisfied will be taken

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<sup>201</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 34(1); *Civil Liability Act 2002* (NSW) ss 32(1); *Civil Liability Act 1936* (SA) s 33(1); *Civil Liability Act 2002* (Tas) s 34(1); *Wrongs Act 1958* (Vic) s 72(1); *Civil Liability Act 2002* (WA) ss 5S(1).

<sup>202</sup> Mental harm is defined in the *Wrongs Act 1958* (Vic) s 67 as ‘psychological or psychiatric injury.’ ‘Pure mental harm’ is defined in the *Wrongs Act 1958* (Vic) s 67 as ‘mental harm other than consequential mental harm.’ The normal fortitude test in relation to pure mental harm is set out in s 72(1) and provides that ‘A person (the defendant) does not owe a duty to another person (the plaintiff) to take care not to cause the plaintiff pure mental harm unless the defendant foresaw or ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.’

<sup>203</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 32; *Civil Liability Act 2002* (NSW) s 27; *Civil Liability Act 1936* (SA) s 33; *Civil Liability Act 2002* (Tas) s 29; *Civil Liability Act 2002* (WA) s 5Q.

<sup>204</sup> For example, the *Civil Liability Act 2002* (WA) s 5S(1) provides: ‘a person (the defendant) does not owe a duty of care to another person (the plaintiff) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.’ Similar provisions are contained within *Civil Law (Wrongs) Act 2002* (ACT) s 34(1); *Civil Liability Act 2002* (NSW) s 32(1); *Civil Liability Act 1936* (SA) s 33. and *Civil Liability Act 2002* (Tas) s 34(1). The legislation goes on to specify, in relation to pure mental harm (defined as mental harm that is not a consequence of a personal injury of any kind: *Civil Law (Wrongs) Act 2002* (ACT) s 32; *Civil Liability Act 2002* (NSW) s 27; *Civil Liability Act 1936* (SA) s 3; *Civil Liability Act 2002* (Tas) s 29; *Wrongs Act 1958* (Vic) s 67; *Civil Liability Act 2002* (WA) s 5Q), a non-exhaustive list of the circumstances of the case that must be considered for the purposes of application of the section (*Civil Liability Act 2002* (WA) s 5S(1); relevant circumstances to be taken into account in other jurisdictions are set out in *Civil Law (Wrongs) Act 2002* (ACT) s 34(2); *Civil Liability Act 2002* (NSW) s 32(2); *Civil Liability Act 1936* (SA) s 33(2) *Civil Liability Act 2002* (Tas) s 34(2); *Wrongs Act 1958* (Vic) s 72(2).) As noted by the High Court in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60, 71 [23], this section does not ‘prescribe any particular consequence as following from the presence or absence of any or all of those circumstances.’

<sup>205</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 34(4) (limitations on duty of care will not apply where defendant ‘knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude’); *Civil Liability Act 2002* (NSW) s 27 (court need not disregard what the defendant knew or ought to have known about the fortitude of the plaintiff); *Civil Liability Act 1936* (SA) s 33(3) (limitation on duty of care does not apply where the defendant ‘knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude’); *Civil Liability Act 2002* (Tas) s 29(4) (court need not disregard what the defendant knew or ought to have known about the fortitude of the plaintiff); *Wrongs Act 1958* (Vic) s 72(3) (limitation on duty of care does not apply where the defendant ‘knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude’); *Civil Liability Act 2002* (WA) s 5S(4) (court need not disregard what the defendant knew or ought to have known about the fortitude of the plaintiff).

<sup>206</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 35(1); *Civil Liability Act 2002* (NSW) s 31; *Civil Liability Act 1936* (SA) s 53(2); *Civil Liability Act 2002* (Tas) s 33.

into account as a factor relevant to establishing a duty of care or in assessing foreseeability for the purpose of deciding whether there has been a breach of the duty of care.<sup>207</sup>

As negligence is premised upon objective standards of behaviour, neither the absence of consent from an image subject to the distribution or publication of images of that person, nor the impact or likely impact of such distribution or publication on the plaintiff's mental state, will suffice to establish the action unless the defendant's conduct is otherwise unreasonable.<sup>208</sup> Rather, the absence of consent and the seriousness of the consequences will be relevant factors in establishing whether the defendant acted unreasonably,<sup>209</sup> but are unlikely to be determinative.<sup>210</sup>

As with the tort of intentional infliction of harm, damage is a prerequisite of the cause of action in negligence. Therefore, an action will not be useful in terms of preventing future damage unless actual compensable damage has already been sustained.<sup>211</sup>

## 9 Harassment

It has variously been said that the common law does not recognise a general tort of harassment,<sup>212</sup> and that the tort is in an 'embryonic form'.<sup>213</sup> In *Grosse* the plaintiff

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<sup>207</sup> In *Tame v New South Wales* (2002) 211 CLR 317 Gummow and Kirby JJ (380 [189]) described the normal fortitude test as going to the issue of foreseeability for the purposes of establishing breach of duty, but Gleeson CJ (332-333 [16]), Gaudron J (339 [45]), McHugh J (346 [71]) and Hayne J (410 [273]) referred to the 'normal fortitude' rule as a control mechanism relevant to a determination of whether or not there existed a duty of care.

<sup>208</sup> Baron Alderson famously stated, in *Blyth v Birmingham Waterworks* (1856) 11 Exch 781, 782: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Moreover, statutory provisions in all jurisdictions (bar the Northern Territory) setting out the general formulation by which breach of duty will be determined provide that (among other things) a person is not negligent in failing to take precautions against a risk of harm unless a reasonable person would, in the circumstances, have taken precautions (*Civil Law (Wrongs) Act 2002* (ACT) s 43(1); *Civil Liability Act 2002* (NSW) s 5B(1); *Civil Liability Act 2003* (Qld) s 9(1); *Civil Liability Act 1936* (SA) s 32(1); *Civil Liability Act 2002* (Tas) s 11(1); *Wrongs Act 1958* (Vic) s 48(1); *Civil Liability Act 2002* (WA) s5B(1)).

<sup>209</sup> *Civil Law (Wrongs) Act 2002* (ACT) s 43(2); *Civil Liability Act 2002* (NSW) s 5B(2); *Civil Liability Act 2003* (Qld) s 9(2); *Civil Liability Act 1936* (SA) s 32(2); *Civil Liability Act 2002* (Tas) s 11(2); *Wrongs Act 1958* (Vic) s 48; *Civil Liability Act 2002* (WA) s5B(2)).

<sup>210</sup> *Wrongs Act 1958* (Vic) s 49(b); *Civil Law (Wrongs) Act 2002* (ACT) s 44(b); *Civil Liability Act 2002* (NSW) s 5C(b); *Civil Liability Act 2003* (Qld) s 10(b); *Civil Liability Act 2002* (Tas) s 12(a) providing: 'the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done'. Mendelson describes the foregoing statutory provisions as consonant with Mason J's approach in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 48 whereby he emphasised that no single factor is determinative, but all must be balanced: Mendelson, above n 186, 331.

<sup>211</sup> See, eg, observations of Hayne and Bell JJ in *Tabet v Gett* (2010) 240 CLR 537, 564 that 'For the purposes of the law of negligence, "damage" refers to some difference to the plaintiff. The difference must be detrimental.' Loss of the chance of a better outcome (absent physical injury); a risk of some future harm, or fear of sustaining harm, is generally, therefore, not compensable under negligence.

<sup>212</sup> ALRC, *Serious Invasions of Privacy*, above n 11, 52; Mendelson, above n 186, 134; *Habib v Commonwealth of Australia (No 2)* [2009] FCA 228 (13 March 2009) [21] Perram J: 'Strictly speaking, there is no such tort'.

<sup>213</sup> Butler, above n 59, 372.

pleaded a number of causes of action, including the tort of harassment.<sup>214</sup> As Skoien DCJ found that the plaintiff had successfully established an invasion of privacy, he found it unnecessary to decide whether a tort of harassment should be recognised.<sup>215</sup> There has been no superior court recognition of such a tort in Australia, although in *Lenah Gummow* and Hayne JJ referred to what *may* be a developing tort of harassment.<sup>216</sup>

In *Chapman v Conservation Council of South Australia*, Williams J noted that harassment may be limited to ‘acts calculated to cause harm to the plaintiff’.<sup>217</sup> As is the case with a possible *Wilkinson* action, a harassment tort (in so far as it has any separate existence) would likely only be effective in remedying photography and filming, or the subsequent publication of images, in situations where it was possible to prove that the defendant possessed subjective intention to cause harm and possibly in situations where intention can be imputed on the basis that harm was likely or very likely to ensue. As with the tort of intentional infliction of harm, imputing intention to a defendant would, in the words of Spigelman CJ in *Naidu*, require ‘something substantially more certain’ than the reasonable foreseeability of psychiatric injury.

The ALRC has recommended that if a statutory cause of action for serious invasion of privacy is not enacted, state and territory governments should enact uniform legislation creating a statutory tort of harassment.<sup>218</sup>

## 10 Trespass

A person in exclusive possession of land<sup>219</sup> may impose conditions upon those who wish to enter or remain on the land, such as a stipulation that no photography or filming is permitted. If these conditions are not respected and consent to remain on the land is withdrawn, the person breaching the conditions becomes a trespasser and the person in

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<sup>214</sup> *Grosse* (2003) Aus Torts Reports ¶81-706, 64,187–8 [448]–[451].

<sup>215</sup> *Ibid* 64,188 [451].

<sup>216</sup> *Lenah* (2001) 208 CLR 199, 255 [123]. Their Honours supported this observation by referring to two academic texts: one of those texts was authored by Townshend-Smith who suggests that harassment claims may be dealt with under the rule in *Wilkinson* rather than as a new and separate tort: citing Richard Townshend-Smith, ‘The Tort of Harassment in English and American Law: The Boundaries of *Wilkinson v Downton*’ (1995) 24 *Anglo-American Law Review* 299, 311. As has been discussed above, the existence of a discrete *Wilkinson* tort in Australia has since been doubted and would, in any event, be of limited application in cases involving the unauthorised distribution of images, given the need to establish recognised psychiatric harm (beyond emotional distress, humiliation and embarrassment) and the need to establish the requisite intention on the part of the party inflicting the mental harm. The other text cited by Gummow and Hayne JJ is Stephen Todd ‘Protection of Privacy’ in Nicholas J Mullany (ed), *Torts in the Nineties* (LBC Information Series, 6<sup>th</sup> ed, 1997) 174, 200–4.

<sup>217</sup> *Chapman v Conservation Council of South Australia* (2002) 82 SASR 449, 492.

<sup>218</sup> ALRC, *Serious Invasions of Privacy*, above n 11, 14 [Recommendation 15-1].

<sup>219</sup> Exclusive possession is a question of fact: *Newington v Windeyer* (1985) 3 NSWLR 555.

exclusive possession may use reasonable force to eject them.<sup>220</sup> As Gleeson CJ observed in *Lenah*:

the premises on which [the] activities took place were private in a proprietary sense. And, by virtue of its proprietary right to exclusive possession of the premises, the respondent had the capacity (subject to the possibility of trespass or other surveillance) to grant or refuse permission to anyone who wanted to observe, and record, its operations.<sup>221</sup>

In recent times it has become increasingly common for public facilities, such as gymnasiums and swimming pools, to restrict filming on their premises.<sup>222</sup> However, although a film may have been captured in circumstances involving a trespass, the physical and intellectual property in the film will usually remain vested in the person who captured it.<sup>223</sup> Where this is the case, an injunction will be required in order to restrain publication of the film. The principles around the issuing of an injunction to restrain publication of a film captured during a trespass were considered by the High Court in *Lenah*.<sup>224</sup> The appeal to the High Court sought to overturn an interlocutory injunction issued by the Full Court of the Supreme Court of Tasmania restraining the ABC from broadcasting a film that had been captured surreptitiously and as a result of a trespass upon the respondent's meat processing premises. The ABC itself was not a party to the trespass. The majority of the High Court found in favour of the appellants and held that the court had no power to grant an injunction absent an underlying cause of action.<sup>225</sup> Gleeson CJ concluded that the fact that the information had been obtained tortiously in the first place was not sufficient to restrain publication on the part of a person into whose hands the information later came.<sup>226</sup> He also expressed the view that even if the person against whom the injunction was sought was the trespasser, an injunction would not lie simply because of the tortious conduct but would need to be based on an appropriate cause of action, such as breach of confidence.<sup>227</sup>

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<sup>220</sup> *Hemmings v Stokes Poges Golf Club* [1920] 1 KB 720; *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605.

<sup>221</sup> *Lenah* (2001) 208 CLR 199, 226–7 [43].

<sup>222</sup> ALRC, *For Your Information*, above n 125, 2332 [69.125].

<sup>223</sup> But see *Lenah* (2001) 208 CLR 199, 246 [102] (Gummow & Hayne JJ) and the discussion below under 12.

<sup>224</sup> *Lenah* (2001) 208 CLR 199.

<sup>225</sup> *Ibid* 230–1 [55] (Gleeson CJ); 231 [58], 232–3 [61]–[62] (Gaudron J); 245–8 [100]–[105] (Gummow and Hayne JJ); cf 271–6 [168]–[184] (Kirby J) and 312–20 [288]–[312] (Callinan J).

<sup>226</sup> *Ibid* 230–1 [55].

<sup>227</sup> *Ibid* 230 [52] (Gleeson CJ), although Gleeson CJ also expressed his view that the cause of action for breach of confidence could be based on the use or disclosure of information which was 'private' and not only confidential in the traditional sense: at 225 [39], 230 [52]. Gummow and Hayne JJ, with whose judgment Gaudron J agreed, held that the views expressed by Young J in *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457, which were relied upon by the respondents, did not support the proposition that the court had power to order an injunction absent an underlying cause of action and that the decision in that case and other cases subsequent to it which allowed an injunction to restrain the publication of a film captured in the course of a trespass may be explicable on other grounds not articulated: at 238 [81], 245–6 [100]. See also *Windridge Farm Pty Ltd v Grassi* [2011] NSWSC 196 (28 March 2011) [122], [133] (Hall J).

Accordingly, the fact that a photograph or film is captured during a trespass is unlikely of itself to provide sufficient basis for the granting of an injunction to restrain the publication of the photograph or film. This is the case even if it is the trespasser themselves who publishes or threatens to publish the film. In any event, the image subject is often not the person who has grounds to sue for trespass. For example, if an image is captured in a public swimming pool despite bans on photography, the image subject has no standing to sue for trespass (not being the person in exclusive possession) and would have to rely on an underlying cause of action in order to successfully restrain publication of the images.

## 11 Nuisance

In contrast with trespass actions, the relevant interference in a nuisance action can be indirect, although the same set of circumstances can give rise to contemporaneous actions in trespass and nuisance.<sup>228</sup> Thus nuisance cases have involved intrusions by way of smell,<sup>229</sup> noise<sup>230</sup> and even light,<sup>231</sup> among other things. In *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor*<sup>232</sup> the appellant racecourse owner alleged that a nuisance had been committed by the respondent who had erected a viewing platform overlooking the appellant's land, from which he was able to observe and broadcast commentary on the races. The appellant claimed that the erection of the platform amounted to an interference with their use and enjoyment of their land and sought to support their argument by alleging that the defendant had infringed their right of privacy.<sup>233</sup> The High Court rejected the appellant's contention that there was an interference with the use and enjoyment of their land and disclaimed the existence of a recognised right of privacy, at least under the head of nuisance.<sup>234</sup>

It is likely that a plaintiff with the requisite proprietary interest will have an action in nuisance to restrain on-going and unwanted surveillance, filming or photography that amounts to a genuine interference with their use and enjoyment of land.<sup>235</sup> In *Raciti v*

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(*Windridge Farm*) holding that there was no basis in equity for the grant of injunctive relief to restrain the capture of a film made during a trespass, where there was no breach of confidence.

<sup>228</sup> *Grosse* (2003) Aus Torts Reports ¶81-706, 64,189 [465].

<sup>229</sup> *Aldred v Benton* (1610) 9 Co Rep 57; *Munro v Southern Dairies Ltd* [1955] VLR 332; *Bone v Seale* [1975] 1 All ER 787; *Domachuk v Feiner* (unreported, NSW Court of Appeal, 18 November 1996).

<sup>230</sup> *Munro v Southern Dairies Ltd* [1955] VLR 332; *Dennis v Ministry of Defence* [2003] EWHC 793 (QB).

<sup>231</sup> *Raciti v Hughes* (1995) 7 BPR 14, 837, SC (NSW).

<sup>232</sup> (1937) 58 CLR 479.

<sup>233</sup> *Ibid* 495–6 (Latham CJ).

<sup>234</sup> *Ibid* 496 (Latham CJ) and 517 (Evatt J). See also *Lenah* (2001) 208 CLR 199, 249 [108] (Gummow and Hayne JJ). For further discussion of this case in the context of a nuisance action, see Anna Bunn and Michael Douglas, 'Breaking New Ground? Nuisance, Negligence and Pure Economic Loss in *Marsh v Baxter*' (2014) 22 *Torts Law Journal* 160, 177–8.

<sup>235</sup> See, eg, *Grosse* (2003) Aus Torts Reports ¶81-706. Here a number of grounds of nuisance were pleaded which involved, inter alia, that the defendant entered the plaintiff's property, loitered near the plaintiff's property and, on at least one occasion, looked through her bedroom window: at 64,189 [463]–[465]. These incidents were held to constitute nuisance. Although the incidents relied on as constituting nuisance did not involve photography or filming, it seems clear that if they had done they would have amounted to a nuisance just the same. See also dicta of Griffiths J in *Bernstein (Baron) v Skyviews Ltd* [1977] 2 All ER 902, 909



*Hughes* Young J held that although the taking of photographs is not generally actionable, there was sufficient evidence in the present case of a 'deliberate attempt to snoop on the privacy of a neighbour' such as amounted to an actionable nuisance.<sup>236</sup> Nevertheless, actions that are more properly categorised as an interference with the person rather than with a person's use or enjoyment of land are unlikely to constitute nuisance.<sup>237</sup>

Even if a person does have grounds to sue in private nuisance in respect of unauthorised photography or filming, the availability of an injunction to restrain the *publication* of images captured during the nuisance is likely to be subject to the same difficulties encountered when seeking an injunction to restrain images captured during a trespass, as discussed above.

## 12 Intellectual Property

Intellectual property laws can assist an image subject to obtain redress for the unauthorised publication of their image in only limited situations. Copyright in images generally resides in the author (usually the person photographing or filming).<sup>238</sup> This means that unless the image is a 'selfie'<sup>239</sup> the image subject will generally not be the copyright owner. A limited exception to this position exists where images have been commissioned, and possibly where they were improperly obtained in circumstances creating a constructive trust.<sup>240</sup>

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suggesting that an action for nuisance would lie if the plaintiff had been subject to the harassment of constant surveillance; Mendelson, above n 186, 680 noting that aside from 'watching and besetting', stalking may also constitute both a crime and a private nuisance.

<sup>236</sup> (1995) 7 BPR 17,837, 14,840.

<sup>237</sup> *Hunter v Canary Wharf Ltd* [1997] AC 655, [722]: Lord Hope referred to the earlier decision of the Court of Appeal in *Khorasandjian v Bush* [1993] QB 727 in which constant telephone calls had amounted to a nuisance and stated that that case was 'concerned with the invasion of the plaintiff's person, not with any invasion of any interest in land' such that the case ought not to have fallen within the scope of the tort; likewise Lord Goff: at [692].

<sup>238</sup> The term 'author' is not comprehensively defined in the *Copyright Act 1968* (Cth). However, 'author' is defined to include 'in relation to a photograph, the person who took the photograph': *Copyright Act 1968* (Cth) s 10.

<sup>239</sup> A 'selfie' is a colloquial term to describe images (usually photographs) of a person (with or without others) taken by that person.

<sup>240</sup> For discussion of whether copyright in an image will be considered to belong to someone other than the person capturing or commissioning the image subject to a constructive trust see *Lenah* (2001) 208 CLR 199, 246 [102] (Gummow and Hayne JJ). Gummow and Hayne JJ sought to explain the basis for the award of an injunction in the case of *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 and subsequent decisions, to restrain the publication of images captured during a trespass but in circumstances where no breach of confidentiality was involved: 'A cinematograph film may have been made, as in *Lincoln Hunt*, in circumstances involving the invasion of the legal or equitable rights of the plaintiff or a breach of the obligations of the maker to the plaintiff. It may then be inequitable and against good conscience for the maker to assert ownership of the copyright against the plaintiff and to broadcast the film. The maker may be regarded as a constructive trustee of an item of personal (albeit intangible) property, namely the copyright conferred by s 98 of the *Copyright Act*.' See also *Windridge Farm* [2011] NSWSC 196 (28 March 2011) (although Hay J decided that no such trust arose on the facts). There have been no subsequent decisions since *Windridge Farm* on the issue of when a constructive trust will arise of the copyright ownership of images captured during a trespass, and this area remains relatively unexplored. Asserting legal

Trade marks will not be available for the majority of people, as registration requires an intention to use the mark in relation to goods or services.<sup>241</sup>

### 13 Contractual Regulation

In some situations a person may be able to gain a remedy for the unauthorised publication of images of themselves by relying on breach of contract. It is common these days for organisations to adopt a privacy policy and these policies are often incorporated into contracts that the organisation enters into with third parties. The incorporation of privacy policies into contracts is common among, but not limited to, organisations operating in the online environment. Indeed, organisations bound by the *Privacy Act 1988* (Cth) ('*Privacy Act*') must have a privacy policy in order to comply with the Act.<sup>242</sup> Privacy policies usually set out the ways in which an organisation uses or intends to use personal information and frequently contain undertakings on the part of an organisation not to pass personal information on to others (other than in certain circumstances). One example is the data use policy of Facebook, the popular social media website. Facebook's data policy sets out the kind of information collected by Facebook, for what it is used and with whom it is shared (among other things).<sup>243</sup> The Facebook data use policy is incorporated into the Facebook terms, which form the contract between Facebook and its members.<sup>244</sup> If information, including an image, were to be used or shared in a way that constituted a breach of an express term of the data use policy, the breach will prima facie give rise to a contractual remedy. Whether or not a contractual remedy is of much use to an individual is an entirely different matter and will depend, among other considerations, upon whether the contract is governed by Australian law or by the laws

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title in the intellectual property rights extant in an image or film, by way of a constructive trust, may therefore be possible when the image has been taken in circumstances involving an invasion of a person's legal or equitable rights, such as where the film is captured during a trespass.

<sup>241</sup> Australian Government, *Get the Right IP: Apply for a Trade Mark: Before you Apply*, IP Australia < Trade marks <http://www.ipaustralia.gov.au/get-the-right-ip/trade-marks/apply-for-a-trade-mark/before-you-apply/>>.

<sup>242</sup> *Privacy Act* s 15 and Australian Privacy Principle 1.3.

<sup>243</sup> Facebook, *Data Policy* (29 September 2016) < <https://www.facebook.com/policy.php>>.

<sup>244</sup> Nevertheless, whether the terms of use have contractual status between Facebook and those who merely access the site (without registering an account with Facebook) is not entirely clear: this is because the terms are stated to apply to anyone who uses or accesses Facebook (Facebook, *Facebook Terms of Service* (30 January 2015) < <https://www.facebook.com/legal/terms>>), yet those who only access the site without registering have not been required to indicate assent to the terms and, indeed, do not have the terms explicitly drawn to their attention. This type of 'agreement' (or assumed agreement) is often referred to as a 'browsewrap' agreement and such 'agreements' are generally believed to be unenforceable on the basis that there is insufficient notice given to the user to establish a valid contract, although there may be exceptions. See, eg, Jay Forder and Dan Svantesson, *Internet and E-Commerce Law* (Oxford University Press, 2007) 50–2; Pauline Sadler and Anna Bunn, 'The Use of YouTube in iLectures: More Copyright Shades of Grey' Vol 16 (1) 2011 *International Journal of Law & Education* 7, 16. Browsewrap agreements can be distinguished from so-called 'clickwrap' agreements where the user does indicate consent to the terms by a positive act, such as by clicking 'I agree' or (as is the case with Facebook registered users) by signing up to a site where sign-up itself indicates acceptance of the site's terms and policies. As to the enforceability of such agreements generally, see, eg, Forder & Svantesson, above n 78, 52.

of an overseas jurisdiction.<sup>245</sup> Also incorporated into the Facebook terms are the Statement of Rights and Responsibilities.<sup>246</sup> These include a number of obligations on the part of the Facebook user regarding the collection and use of others' information<sup>247</sup> but contain few reciprocal rights on the part of a user where others misuse their information.

Aside from reliance upon a privacy policy incorporated into a contract, individuals may have an action for breach of contract where there is breach of an express or an implied term limiting the use to which images can be put. Express terms limiting the use of images are common in sponsorship agreements between organisations and celebrities or sportspeople, or in publication agreements between the media and celebrities.<sup>248</sup> Pannam refers to two old English cases in which non-celebrity individuals were successful in restraining the use of a photograph of themselves on the grounds that use of the photograph constituted breach of an implied term of a contract under which the photographs were taken, such that all prints from the negative were for the sole use of the customer.<sup>249</sup>

As has been discussed above, it is open to those with a proprietary interest in land to impose conditions on the entry onto or remaining upon land. If a condition of entry prohibits photography or filming (and is sufficiently incorporated into a contract governing entry onto the premises in question), the publication of images taken in breach of that condition give rise to an action for breach of contract against the person who captured the images. However, the rules on privity of contract mean that actions for breach of contract usually only benefit those who are party to the contract.<sup>250</sup>

In the course of contributing to the ALRCs inquiry into Australian privacy law and practice, many young people expressed trust in the reporting mechanisms offered by social networking sites and appeared to believe that these mechanisms would allow for the removal of images that had been posted without authorisation.<sup>251</sup> However, an

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<sup>245</sup> For example, the Facebook terms of use that apply to members signing up in Australia are governed by the laws of the State of California and the parties submit to the jurisdiction of the courts of Santa Clara County, California, for the purpose of litigating all such claims: Facebook, *Facebook Terms of Service* (30 January 2015) < <https://www.facebook.com/legal/terms> > term 15(1).

<sup>246</sup> Facebook, *Statement of Rights and Responsibilities*, 30 June 2015 < <https://www.facebook.com/legal/terms> >.

<sup>247</sup> Ibid, term 3.

<sup>248</sup> For example, Michael Douglas and Catherine Zeta-Jones entered into a contract with *OK! Magazine* ahead of their wedding whereby the magazine promised to pay them the sum of 500,000 pounds each, in return for which the magazine would have the exclusive right to publish photographs of the wedding and an accompanying article (*Douglas & Ors v Hello Ltd & Ors* [2005] EWCA Civ 595, Lord Phillips MR at [5]).

<sup>249</sup> Pannam, above n 133, 5–6 referring to *Pollard* (1888) 40 Ch. D. 345 and *Stedall v Houghton* (1901) 18 T.L.R 126. Megan Richardson notes that most textbooks construed *Pollard* as a case of contract: Richardson et al, above n 54.

<sup>250</sup> *Tweddle v Atkinson* (1861) 1 B & S 393; 121 ER 762; *Beswick v Beswick* [1968] AC 58; *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 468; albeit that there are limited exceptions to the doctrine: see, eg, Stephen Graw, *An Introduction to the Law of Contract* (Lawbook Co, 8<sup>th</sup> ed, 2015) 231 – 232.

<sup>251</sup> ALRC, *For Your Information*, above n 125, 2234 [67.43].

examination of the terms and conditions of many of the popular social networking sites reveals that while the site host generally retains wide discretion to remove images, they are generally under no obligation to do so, even in response to a request by an individual who can demonstrate that an image has been posted without consent or where the image contravenes the site's own terms and conditions.<sup>252</sup>

In summary, one of the most obvious limitations of a breach of contract action in remedying the unauthorised publication of images of a person is that in the majority of cases — particularly where images are published by an individual acting in a purely personal capacity and in cases where the parties are friends or social acquaintances — there will be no contract between the parties involved at all.<sup>253</sup> Where a contract does exist, it will only provide a remedy if the contract expressly or impliedly stipulates against the use of images of the image subject, or imposes conditions that must be met before such images are used. Even where a contractual remedy is available, issues of cross-jurisdictional enforcement may present a serious barrier to the utility of such actions.

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<sup>252</sup> Facebook, *Facebook Terms of Service* (30 January 2015) <<https://www.facebook.com/legal/terms>> term 5(2) allows Facebook to remove content that violates their terms, which include commitments by users not to upload content which violates someone else's rights or the law. There is no obligation to remove the content, although Facebook does state that it will 'remove content, disable accounts or work with law enforcement when we believe that there is a genuine risk of physical harm or direct threats to public safety': Facebook, *Community Standards, Helping to Keep you Safe*, <<https://www.facebook.com/communitystandards>>. The terms of MySpace provide that 'Myspace may reject, refuse to post or delete any Content that, in the sole judgment of Myspace, violates this Agreement, is inappropriate for the MySpace Services or which may be offensive, illegal or violates the rights of any person or entity, or harms or threatens the safety of any person or entity': MySpace, *MySpace Services Terms of Use Agreement* (1 September 2015) <<https://myspace.com/pages/terms>> term 7.1. It is made explicit that MySpace has no obligation to remove inappropriate content: MySpace, *MySpace Services Terms of Use Agreement* (1 September 2015) <<https://myspace.com/pages/terms>> term 7.1. YouTube's terms of service provide that 'YouTube may at any time, without prior notice and in its sole discretion, remove such Content and/or terminate a user's account for submitting such material in violation of these Terms of Service': YouTube, *Terms of Service*, (9 June 2010) <<https://www.youtube.com/static?gl=AU&template=terms>>. Instagram's terms provide that Instagram 'may, but have no obligation to, remove, edit, block, and/or monitor Content or accounts containing Content that we determine in our sole discretion violates these Terms of Use': Instagram, *Terms of Use* (19 January 2013) <<https://help.instagram.com/478745558852511>> general condition 6. Twitter's terms of service provide that 'we reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to you. We also reserve the right to access, read, preserve, and disclose any information as we reasonably believe is necessary to (i) satisfy any applicable law, regulation, legal process or governmental request, (ii) enforce the Terms, including investigation of potential violations hereof, (iii) detect, prevent, or otherwise address fraud, security or technical issues, (iv) respond to user support requests, or (v) protect the rights, property or safety of Twitter, its users and the public': Twitter, *Twitter Terms of Service* (27 January 2016) <<https://twitter.com/tos?lang=en>> term 8.

<sup>253</sup> Where the presumption that there is no intention to create legal relations between family members or friends is not rebutted: see, eg, Graw, above n, 250, 118 – 126.

## B Federal Information Privacy Laws

The *Privacy Act* regulates the collection and handling of personal information by federal government agencies and certain private sector organisations.<sup>254</sup> The collection and management of personal information by state-based government agencies is generally regulated by state-based information privacy laws or privacy schemes.<sup>255</sup> An overview of the way that each state and territory regulates information privacy is beyond the scope of this thesis, but importantly state-based legislation generally only regulates the state public sector agencies and will not regulate the handling of personal information by federal government agencies, private sector organisations or individuals.<sup>256</sup> The following section therefore considers the application of the federal information privacy regime established by the *Privacy Act*.

As observed by the Full Court of the Federal Court in *Austen v Civil Aviation Authority*, '[i]t would appear that a deliberate decision was made by Parliament not to give a right of action in tort for breach of a privacy principle.'<sup>257</sup> The lack of standing to sue for an interference with privacy under the *Privacy Act* is one of the obvious limitations of the national privacy regime in providing individuals with a measure of control over the publication of images of themselves.

The *Privacy Act* does not regulate privacy in any general sense but rather regulates the way in which personal information is collected, stored and used. Personal information is currently defined in the *Privacy Act* as 'information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified or reasonably identifiable individual'.<sup>258</sup>

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<sup>254</sup> APP Entities (defined in *Privacy Act* s 6) are bound to comply with the Australian Privacy Principles (set out in schedule 1 of the Act) ('APPs') and an act or practice of an APP Entity that breaches an APP or any privacy code registered under the Act in relation to personal information about an individual is deemed an 'interference with the privacy of an individual' (*Privacy Act* s 13).

<sup>255</sup> The following Acts make provision for information privacy: *Information Privacy Act 2014* (ACT); *Privacy and Personal Information Protection Act 1998* (NSW); *Information Act* (NT); *Information Privacy Act 2009* (Qld); *Personal Information and Protection Act 2004* (Tas); *Privacy and Data Protection Act 2014* (Vic); *Freedom of Information Act 1992* (WA). In addition, South Australian government agencies are required, by administrative instruction contained in the Premier and Cabinet (SA) Circular 12, Information Privacy Principles (IPPs) Instruction PC012, 16 September 2013, to conform to a set of Information Privacy Principles. In addition to these regulations, a number of states have separate regulations governing the collection and management of health records by the public sector, and in some cases the private sector: *Health Records (Privacy and Access Act) 1997* (ACT); *Health Records and Information Privacy Act 2002* (NSW); *Health Records Act 2001* (Vic). State government agencies may also be regulated by other laws, such as those dealing with telecommunications or surveillance — refer to E.

<sup>256</sup> An overview of state based information privacy laws is contained in the ALRC Report: see ALRC, *For Your Information*, above n 125, vol 1, 164–84.

<sup>257</sup> *Austen v Civil Aviation Authority* (1994) 50 FCR 272, 278. In its more recent privacy report, the ALRC did not recommend recognition of a cause of action arising from non-adherence to any of the APPs under the *Privacy Act* per se. It had previously, of course, recommended the introduction of a statutory cause of action for serious invasion of privacy: *Ibid*, 88 [Recommendation 74-1].

<sup>258</sup> *Privacy Act* s 6(1).

No guidance has yet been issued by the OAIC on the application of the current definition of personal information to images specifically, although the government has indicated a need for OAIC guidance on the application of this definition in general.<sup>259</sup> However, as to the meaning of the words 'identified' and 'reasonably identifiable' the Explanatory Memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth) offers the following explanation:

Whether an individual can be identified or is reasonably identifiable depends on context and circumstances. While it may be technically possible for an agency or organisation to identify individuals from information it holds, for example, by linking the information with other information held by it, or another entity, it may be that it is not practically possible. For example, logistics or legislation may prevent such linkage. In these circumstances, individuals are not 'reasonably identifiable'. Whether an individual is reasonably identifiable from certain information requires a consideration of the cost, difficulty, practicality and likelihood that the information will be linked in such a way as to identify him or her.<sup>260</sup>

The explanation above suggests that a person must be identified or reasonably identifiable to the entity that holds the information. However, guidance subsequently provided by the OAIC notes that a relevant consideration in determining whether an individual is reasonably identifiable, where that information is publicly released, will include whether a reasonable member of the public who accesses the information would be able to identify the individual.<sup>261</sup> This suggests that an image might be considered personal information even if an image subject is not identified to or reasonably identifiable by the entity itself. Where an image is therefore made accessible to the public, such as on the website of an entity bound by the Australian Privacy Principles ('APPs'), and a reasonable member of the public with access to the website would be able to identify the individual, the image may be considered 'personal information' regardless of whether the entity itself can reasonably identify the individual from the image. However, the OAIC has also suggested that a broad enough section of the public must be able to identify an individual from information about them in order for that information to be

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<sup>259</sup> Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth), 53. Various state-based Privacy Commissioners have, however, provided guidance on the question of whether images constitute personal information (as that term was defined previously defined in the *Privacy Act*). The Office of the Victorian Privacy Commissioner advises that in determining whether an image constitutes personal information it is necessary to take into account a number of factors, such as the clarity of the image and the context: Office of the Victorian Privacy Commissioner, *Images and Privacy*, Information Sheet 01.03, 31 January 2003 <[http://www.privacy.vic.gov.au/domino/privacyvic/web2.nsf/files/images-and-privacy/\\$file/info\\_sheet\\_01\\_03.pdf](http://www.privacy.vic.gov.au/domino/privacyvic/web2.nsf/files/images-and-privacy/$file/info_sheet_01_03.pdf)>.

<sup>260</sup> Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth), 61.

<sup>261</sup> OAIC, *Australian Privacy Principles Guidelines*, 31 March 2015, Chapter B, Key Concepts (Meaning of 'Reasonably Identifiable').

considered personal information.<sup>262</sup> What constitutes a broad enough section of the public is nowhere defined.

Images will also be treated as personal information if a person is identifiable by a combination of information held by a particular agency or organisation. One example is that advances in technology, such as facial recognition software as described in Chapter One, may allow an individual to be identified not merely from the information itself but from the aggregation of the information in the image with other information in the possession of an agency or organisation.<sup>263</sup>

The definition of personal information in the *Privacy Act* requires the information to be 'about an individual' (emphasis added). As such, where a person is depicted as part of a group of people, or where their depiction is incidental to the image rather than the focus of it, the image is arguably not *about* the individual and will not fall within the definition of 'personal information'.<sup>264</sup> On the other hand, a recent determination of the Privacy Commissioner found that information can be 'about' more than one person and still constitute 'personal information about an individual' under the definition of personal information in the *Privacy Act*.<sup>265</sup>

The *Privacy Act* applies to federal government agencies and certain private organisations<sup>266</sup> but does not currently apply to the acts or practices of individuals (other than those done or engaged in the course of a business carried on by an individual).<sup>267</sup> Small business operators, namely those with an annual turnover of \$3 million or less in the previous financial year, are also generally exempt from the Act.<sup>268</sup> This means that many instances of unauthorised collection or use of personal information, including images, will not be subject to the principles around the collection, use and handling of

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<sup>262</sup> Telephone Conversation with Carl, OAIC Enquiry Officer (2 September 2015).

<sup>263</sup> Refer to the discussion in Chapter One, Part Three, Section B. Facebook, for example, holds a large repository of biometric templates (or face prints) in the form of algorithms which it uses for the purpose of automatically identifying certain Facebook users in images uploaded to Facebook by other users: see Facebook, *Tagging Photos*, <<http://www.facebook.com/help/463455293673370/>> (*What Information does Facebook Use to Tell that a Photo Looks Like Me and to Suggest that Friends Tag Me*).

<sup>264</sup> The ALRC did not recommend a change to the terminology 'about an individual' in the definition of personal information in the *Privacy Act*, noting that the wording was consistent with that employed in the Asia-Pacific Economic Cooperation Privacy Framework (2005), even though a number of international instruments use the term 'relates to an individual.' ALRC, *For Your Information*, above n 125, vol 1, 309 [6.51].

<sup>265</sup> *Ben Grubb and Telstra Corporation Limited* [2015] ALCmr 35 (1 May 2015) 27 [117], although note that the relevant definition of personal information was that as it existed prior to amendments made to the *Privacy Act* by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth)*.

<sup>266</sup> *Privacy Act* s 6C.

<sup>267</sup> *Ibid* s 7B(1).

<sup>268</sup> *Ibid* ss 6C, 6D. Though note that small business operators that handle certain information, such as health information, will not be exempt even if their turnover threshold is lower (s 6D(4)).

such information set out in the APPs or a registered privacy code.<sup>269</sup> In a statement made to the Senate Environment and Communications Committee, in the context of their inquiry into the protection of the privacy of Australians online, Ms King-Siem, Vice President of the Victorian Council for Civil Liberties (Liberty Victoria), argued that the *Privacy Act* needed to be strengthened in order to better promote and protect the privacy of individuals:

We believe that privacy is a fundamental human right. It is recognized under article 17 of the [*International Covenant on Civil and Political Rights*]. We do not believe that it is adequately protected in Australia. There is what I would term a patchwork of legislative protections that we have. For instance, in our federal *Privacy Act* there is an exemption for small business. Small business is, going on the Victorian Privacy Commissioner's submission, approximately 95 per cent of business in Australia, which means that 95 per cent of business is not subject to privacy regulation.<sup>270</sup>

Another limitation of the *Privacy Act*, in the online context, is the ambiguity over the extent to which overseas organisations, such as Internet Service Providers (ISPs)<sup>271</sup> based wholly offshore, are governed by the *Privacy Act* and the APPs.<sup>272</sup> The *Privacy Act* has some application to the acts and practices of foreign agencies and organisations where the act or practice relates to personal information about a person in Australia and other requirements are met.<sup>273</sup> Where an organisation is a body corporate but is not incorporated in Australia, the *Privacy Act* will apply if the organisation carries on business in Australia and the personal information involved was collected or held by the organisation in Australia either before or at the time of the act or practice.<sup>274</sup> These requirements are known as the 'Australian link' requirements.<sup>275</sup> The Explanatory Memorandum to the Privacy Amendments (Enhancing Privacy) Bill 2012 explains that the words 'in Australia' in the organisational link requirements should be interpreted to 'include the collection, by an overseas entity, of personal information from an individual who is physically within the borders of Australia or an external territory, and that this would include collection from an individual physically located in Australia over the internet by a company which has no physical presence in Australia.'<sup>276</sup> The Memorandum also clarifies that those entities which 'have an online presence (but no physical presence

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<sup>269</sup> Ibid s 15. Organisations and Agencies to whom the *Privacy Act* applies are known as 'APP Entities' and are obliged to comply with the APPs set out in the Act or, where an APP Entity is bound by a privacy code that has been approved by the OAIC, with that approved code.

<sup>270</sup> Evidence to Senate Environment and Communications References Committee, Parliament of Australia, Canberra, 1 December 2010, 15 (Ms Georgia King-Siem, Vice President, Victorian Council for Civil Liberties (Liberty Victoria)).

<sup>271</sup> As the term is defined in BSA s 5, cl 8. See further the list of Defined Terms used in this thesis.

<sup>272</sup> See, eg, Anna Bunn, 'Facebook and Face Recognition: Kinda Cool, Kinda Creepy' (2014) 25(1) *Bond Law Review* 35.

<sup>273</sup> *Privacy Act* s 5B(1).

<sup>274</sup> Ibid s 5B(3).

<sup>275</sup> Ibid s 5B(2) and (3).

<sup>276</sup> Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth), 218.



in Australia), and collect personal information from people who are physically in Australia, carry on a business in Australia or an external Territory'.<sup>277</sup> Nevertheless there remains some uncertainty as to the extent to which the *Privacy Act* will apply to information received or generated by organisations without a physical presence in Australia.<sup>278</sup>

Finally, the *Privacy Act* is of limited use in providing individuals with control over their images because even when an organisation or entity is bound to comply with the APPs, those principles do not generally prevent the collection or use of photographs and videos of individuals, even where that collection or use occurs without consent and is unwanted. That is, provided that an APP entity collects those images in a fair and lawful manner and complies with the other APPs, there is no prohibition on the capture and use of photographs or videos, even without consent. An exception applies in relation to 'sensitive information', which can generally only be collected with the express consent of the individual to whom the information relates.<sup>279</sup> The definition of 'sensitive information' in the *Privacy Act* includes (but is not limited to) information or an opinion about an individual's health, beliefs, racial or ethnic origin, political or Trade Union associations and sexual preferences and practices.<sup>280</sup>

An image *may* be considered sensitive information depending on the information revealed by the image itself and any associated metadata — for example, a photograph of two same sex individuals kissing each other, or even holding hands, could be considered sensitive information because it reveals information about an identified individual's sexual preferences and practices. Photographs will also be treated as sensitive information where they constitute 'biometric information', which they will do where, for example, they are used for the purpose of automated biometric verification or biometric identification.<sup>281</sup> Photographs used in Australian passports, for example, will constitute sensitive personal information. It is also likely that photographs used to create biometric templates to be used within face recognition systems would constitute sensitive information. Facebook, for example, may use photographs of some of its users to create biometric templates for the purpose of automatically identifying those users in other

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<sup>277</sup> Ibid.

<sup>278</sup> Essentially this is because there is some ambiguity over how the word 'collect' in the organisational link requirements should be interpreted. See generally, Bunn, 'Facebook and Face Recognition', above n 272. The OAIC itself has expressed a view that Facebook would be bound by the Act where it receives personal information about an Australian individual that has been entered into a computer located in Australia (even if the server is located outside of Australia) but also notes that this view has not been tested: Telephone Conversation with Carl, OAIC Enquiry Officer (2 September 2015).

<sup>279</sup> *Privacy Act* APP 3.3. Where the collector is an organisation the information must also be reasonably necessary for one or more of its functions or activities.

<sup>280</sup> Ibid s6.

<sup>281</sup> Ibid (definition of 'sensitive information'). Note that biometric information is not defined in the *Privacy Act* but the Explanatory memo to the Bill notes that the amendment to the definition of sensitive information to include biometric information implemented the ALRC recommendations to that effect, and also notes the broad reach of what is capable of being considered biometric information: Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth) 62.

photographs.<sup>282</sup> Such photographs will probably be regarded as sensitive information given that the purpose of collecting them is to use them for automatic biometric identification.<sup>283</sup>

In summary, there are a number of limitations of the *Privacy Act* in providing individuals with control over the way in which personal information in the form of images is collected and handled. These include the lack of standing on the part of affected individuals to sue for an interference with privacy under the Act; the fact that an image will only be considered 'personal information' in certain circumstances; and the fact that the Act does not apply to individuals acting in their personal capacity, or to small businesses.

In the online context, there is ambiguity over the extent to which overseas organisations, such as ISPs based wholly offshore, are governed by the *Privacy Act* at all and, if they are, the extent to which the APPs govern their practices.<sup>284</sup> Even when it is clear that an entity is bound by the APPs, it has been noted that, with exceptions in the case of sensitive information, this generally does not stop the entity from collecting or using photographs and videos of an individual, even where that collection or use occurs without consent and is unwanted.

Chapter Four further illustrates the limitations of the *Privacy Act* in the context of a number of hypothetical examples.

### C *Enhancing Online Safety for Children Legislation*

The *Enhancing Online Safety for Children Act 2015* (Cth) ('*Online Safety Act*') establishes a Children's e-Safety Commissioner ('the e-Safety Commissioner') and a complaints system to deal with cyberbullying material that is targeted at an Australian child and posted on a social media service or relevant electronic service.<sup>285</sup> The Act also provides for a rapid

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<sup>282</sup> Facebook explains that '[w]e currently use facial recognition software that uses an algorithm to calculate a unique number ("template") based on someone's facial features, like the distance between the eyes, nose and ears. This template is based on photos you've been tagged in on Facebook. We use this template to suggest tags to you when you're adding a new photo to Facebook ... Thus, when a new photograph of an individual in the "face print" database is uploaded to Facebook, the facial recognition software is able to automatically suggest the name of the person in the new photograph': Facebook, *Tagging Photos*, (July 2013) <<http://www.facebook.com/help/463455293673370/>>.

<sup>283</sup> The term automated biometric identification is not defined in the *Privacy Act* nor in the Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth) ('Explanatory Memorandum'). The Explanatory Memorandum notes, at 62, that the amended definition of sensitive information is designed to reflect the ALRC's recommendations in relation to biometric information and templates. The ALRC states that biometric information should be classed as sensitive information when it is collected for use in automated systems and that this protection is necessary 'to address the most serious concerns around biometric information, for example, that such information may be used to identify individuals without their knowledge or consent': ALRC, *For Your Information*, above n 125, vol 1, 325 [6.120].

<sup>284</sup> See, eg, Bunn, 'Facebook and Face Recognition' above n 272.

<sup>285</sup> The definition of 'cyber-bullying material targeted at an Australian child' is discussed in C below. A social media service is defined in *Online Safety Act* s 9, and in essence is a social media service if the primary or sole purpose of the service is to enable online social interaction between two or more end-users, is a service that allows end-users to link or interact with another or other end-users and allows end-users to post

removal scheme in relation to cyberbullying material that is targeted at an Australian Child and posted on a social media service that is categorised under the Act as either a Tier 1 or a Tier 2 social media service.<sup>286</sup> The e-Safety Commissioner may also issue notices to a person who has posted cyberbullying material targeted at an Australian child (an end-user), which can require the removal of material by the end-user, the issuance of an apology by the end-user to the child in question, or an agreement on the part of the end-user not to further post material.<sup>287</sup>

The extent to which the *Online Safety Act* is likely to provide children with control over images themselves is somewhat unpredictable, given that the legislation and the complaints and removal system it establishes is still in its infancy. However, the definition of 'cyberbullying material targeted at an Australian child' under the Act will clearly limit the types of images that can be investigated by the e-Safety Commissioner. Only material that is seriously 'threatening', 'intimidating', 'harassing' and 'humiliating' will come within the purview of the e-Safety Commissioner, and material that is merely insulting or offensive will not constitute cyberbullying material under the Act.<sup>288</sup> The question of whether material constitutes cyberbullying material will also be considered from the point of view of an ordinary, reasonable person: in other words it is an objective test.<sup>289</sup> Although the e-Safety Commissioner is able to consider the particular circumstances and vulnerabilities of the child whom is targeted by the material,<sup>290</sup> the fact remains that the

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material on the service (and satisfies any other conditions that may be specified in any legislative rules made by the responsible Minister pursuant to s108 of the *Online Safety Act*. A 'relevant electronic service' is defined in section 4 and includes, among other things, email services, SMS and MMS services.

<sup>286</sup> A social media service is a Tier 1 service if the service has applied to be declared as a Tier 1 service under *Online Safety Act* s 23, is not a Tier 2 service and meets certain basic online safety requirements. A Tier 2 service is a service that has been declared as such under s 30 following recommendation by the Children's e-Safety Commissioner pursuant to s 31. Only large social media services or those who have requested to be declared as Tier 2 services can be recommended by the Commissioner for classification as a Tier 2 service. There is no definition as such of a 'large social media service'. Instead, the Act provides that in determining whether a service is a large social media service, the Children's e-Safety Commissioner should have regard to a number of considerations including the number of user accounts held by Australian residents, the number of user accounts held by Australian resident children and such other matters as the Commissioner considers relevant: *Online Safety Act* s 31(8).

<sup>287</sup> *Online Safety Act* s 3.

<sup>288</sup> The material must be such that an ordinary reasonable person would conclude that 'it is likely that the material was intended to have an effect on a particular Australian child' and the material would be likely to have the effect on the child of 'seriously threatening, seriously intimidating, seriously harassing or seriously humiliating' that child: *Ibid* s 5.

<sup>289</sup> Explanatory Memorandum to the Enhancing Online Safety for Children Bill 2014, 10.

<sup>290</sup> The Office of the Children's e-Safety Commissioner provides the following explanation as to how the Commissioner decides if something is serious cyberbullying material: 'We take a flexible approach so that children who are genuinely affected by cyberbullying material are protected. This involves considering both the individual child and the material itself. When we consider a child we look at the child's background and particular circumstances, any vulnerabilities of the child and the relationship between the child and the person posting the material. When considering the material, we look at things like the language used, the impact of any audio or visual material, the sensitivity of the material, the number of potential views and how often the material was posted. To be pursued, material must be more than merely offensive or insulting': To be pursued, material must be more than merely offensive or insulting': Office of the Children's e-Safety Commissioner, *How Does the Commissioner Decide if Something Is Serious Cyberbullying Material?*,

material must be considered objectively humiliating, harassing and so on before the e-Safety Commissioner can intervene.

Moreover, to fall within the definition of ‘cyberbullying material targeted at an Australian child’ an ordinary, reasonable person must also conclude that ‘it is likely that the material was intended to have an effect on a particular Australian child’.<sup>291</sup> Therefore, if it does not seem likely that material was intended to have such an effect then, even if it does so, the Commissioner cannot investigate.

Complaints about cyberbullying material can be made to the e-Safety Commissioner by a child who believes they are or may be the target of such material,<sup>292</sup> or by a person on behalf of the child.<sup>293</sup> It is beyond the scope of this chapter to consider the complaints process in detail, but the e-Safety Commissioner is given power to investigate all complaints — including complaints about material sent by SMS or MMS.<sup>294</sup> However, there is no process to request or require removal of material from an electronic service (for example, material sent by SMS or MMS between mobile phones) unless that service is listed under the scheme as a Tier 1 or Tier 2 social network service. In relation to complaints upheld against Tier 1 social media services, the e-Safety Commissioner can request the service to remove cyberbullying material.<sup>295</sup> The failure of a Tier 1 service to comply with a removal request does not result in any direct enforcement measures. However, where a Tier 1 service repeatedly refuses to comply with requests for removal of relevant material over a 12-month period, the e-Safety Commissioner may revoke the service’s Tier 1 status and recommend that the Minister re-categorise the service as a Tier 2 service.<sup>296</sup> In relation to complaints upheld against Tier 2 social media services, the e-Safety Commissioner can require the service to remove the offending material by issuing a Social Media Services Notice.<sup>297</sup> The failure of a Tier 2 service to comply with a notice requiring removal of cyberbullying material will attract a civil penalty<sup>298</sup> and the e-Safety Commissioner may issue a formal warning.<sup>299</sup>

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Cyberbullying Complaints FAQs, < <https://www.esafety.gov.au/complaints-and-reporting/cyberbullying-complaints/cyberbullying-complaints-faqs>>.

<sup>291</sup> *Online Safety Act* s 5(b).

<sup>292</sup> *Ibid* s 18(1). Under the Act, a child is a person under 18 years of age (s 4), but there is also provision for children who have reached 18 to make a complaint in respect of material targeting them when they were under 18, provided, among other things, that the complaint is made within six months of them turning 18 (s 18(3)).

<sup>293</sup> *Online Safety Act* s 18(2).

<sup>294</sup> As these are included under the definition of a ‘relevant electronic service’: *Ibid* s 4.

<sup>295</sup> *Ibid* s 29.

<sup>296</sup> *Ibid* s 26. The Minister can also publish a statement on the Office of the Children’s e-Safety Commissioner to that effect: *Online Safety Act* s 39.

<sup>297</sup> *Ibid* s 35.

<sup>298</sup> *Ibid* s 36. The civil penalty is enforceable as an enforceable undertaking and subject to injunctive remedy under the *Regulatory Powers (Standard Provisions) Act 2014* (Cth): *Online Safety Act* ss 47, 48.

<sup>299</sup> *Online Safety Act* s 37. The Minister can also publish a statement on the Office of the Children’s e-Safety Commissioner to that effect: *Online Safety Act* s 40.

One potentially significant limitation on the efficacy of the cyberbullying material removal regime established by the *Online Safety Act* is that the e-Safety Commissioner can only request the removal of such material posted on a Tier 1 or Tier 2 service. In order to be classified as a Tier 1 service, a social network service must apply to be so classified.<sup>300</sup> At the time of writing, a number of social network services are listed as Tier 1 services. These include Twitter, Ask.fm and Flickr. A number of services are currently classified as Tier 2 services; these include Facebook, Instagram and YouTube. Social media services not listed as Tier 1 or Tier 2 are under no obligation to apply for listing as either a Tier 1 or Tier 2 service.<sup>301</sup> However, there is some incentive for large social media services to apply for classification as a Tier 1 service. The incentive is that by being classified as a Tier 1 service, the service has the benefit of electing whether complaints will be dealt with under the 'default' or the 'special' rule.<sup>302</sup> The difference between the 'default' rule and the 'special' rule is that under the default rule the e-Safety Commissioner assesses whether material is 'cyberbullying material targeted at an Australian child' by reference to the definition in the Act, whereas under the special rule material is first assessed as to whether it breaches the service's own terms of use, and only if it does is it assessed against the legislative definition.<sup>303</sup> However, this incentive is very limited, given that the e-Safety Commissioner is unable to recommend that a service be classified as a Tier 2 service without first giving it the opportunity to apply for classification as a Tier 1 service.<sup>304</sup> For social media services that are unlikely to be considered a 'large social media service' there is, arguably, no incentive to apply for classification as a Tier 1 service. This is because the e-Safety Commissioner cannot recommend that a service be classified as a Tier 2 service unless it is a 'large social media service'<sup>305</sup> or unless the service itself has requested the e-Safety Commissioner to make such a declaration.<sup>306</sup> The fact that the removal scheme is entirely contingent upon material being posted on a social media service that is classified as either a Tier 1 or Tier 2 service is therefore, potentially, a significant limitation. It is not clear whether this limitation has been recognised as such by the government.<sup>307</sup>

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<sup>300</sup> Ibid s 23.

<sup>301</sup> Office of the Children's e-Safety Commissioner, *Social Media Partners* <<https://www.esafety.gov.au/social-media-regulation/social-media-partners>>.

<sup>302</sup> *Online Safety Act* s 23(3). The default rule is set out in s 29 and the special rule in s 29(2).

<sup>303</sup> Ibid s 29(2).

<sup>304</sup> Ibid s 31.

<sup>305</sup> The Act does not contain any definition of a 'large social media service' but sets out a number of considerations that the e-Safety Commissioner should have regard to when determining if a social media service is 'large'. These include the number of accounts held by end-users residing in Australia and the number of accounts held by Australian children. The e-Safety Commissioner may also take into account other factors in making that determination: Ibid ss 31(8)-(11).

<sup>306</sup> Ibid s 31(3).

<sup>307</sup> The Regulation Impact Statement ('RIS') that forms part of the Explanatory Memorandum to the Enhancing Online Safety for Children Bill 2014: Explanatory Memorandum, Enhancing Online Safety for Children Bill 2014, 14–64 notes that there is a risk that smaller social media sites may not respond to requests from the Commissioner to remove cyberbullying material, because they are not subject to legally binding notices and penalties: ay27. There is, within this statement, an assumption that the Commissioner

In summary, there are a number of potential limitations of the *Online Safety Act* in providing children with control over their image. The extent of these is somewhat unknown, given that the regime established by the Act is still in its infancy.<sup>308</sup> However, one limitation is that the interpretation of ‘cyberbullying material targeted at an Australian child’ is such that material that is merely insulting or offensive will not constitute ‘cyberbullying’ material under the Act. Another potentially significant limitation is that complaints can only be made about material posted on a Tier 1 or Tier 2 social media service, and social media services have no obligation to apply for classification as either a Tier 1 or Tier 2 service.

#### D *Regulation of Content under the Broadcasting Services Act 1992 (Cth)*

Online content in Australia is regulated by a scheme set out in schedules 5 and 7 of the *BSA*. The *BSA* also regulates ISPs<sup>309</sup> and internet content hosts.<sup>310</sup> This national regulatory scheme was previously administered by ACMA. However, since the enactment of the *Online Safety Act*, administration of the scheme is now the responsibility of the e-Safety Commissioner,<sup>311</sup> which is an independent statutory office within ACMA.<sup>312</sup> Schedule 7 of the *BSA* provides that certain content is prohibited or potentially prohibited,<sup>313</sup> and the definitions of ‘prohibited’ and ‘potentially prohibited’ are tied to the way in which such content is or would be classified by the Australian Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)*.<sup>314</sup> Where content is prohibited or potentially prohibited and where the content is hosted or provided in Australia, the e-Safety Commissioner is able to issue a ‘take-down’ notice to the content host requiring the removal of the prohibited or potentially prohibited content<sup>315</sup> (or where the content is hosted live, issue a cessation notice).<sup>316</sup> Failure to comply with a

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will be able to issue requests for removal of material to smaller social network sites (whereas, unless the service is a Tier 1 service there is no power under the Act to make such a request). Nevertheless, the RIS goes on to explain that the Commissioner will be ‘expected to build strong working relationships with social media services used by children in Australia, whether formally subject to the legislation or not’. The RIS also notes that the Commissioner may ‘make informal requests to the sites not subject to Tier 2 regulation to remove cyber-bullying material’: at 27. It is unclear whether this is intended to refer to requests made under the Tier 1 scheme, or not.

<sup>308</sup> In its first twelve months’ of operation (to 1 July 2016), the Office of the Children’s e-Safety Commissioner reported that it helped to resolve 186 complaints of serious cyberbullying for under 18s, and found that 71% of targets were girls and the remainder boys: Office of the Children’s e-Safety Commissioner, Australian Government, *eSafety 12 Month Report* (July 2016) < <https://www.esafety.gov.au/12-month-report>>.

<sup>309</sup> *BSA* sch 5, cl 8.

<sup>310</sup> *Ibid*, cl 3.

<sup>311</sup> *Online Safety Act* s 15(1)(a)(ii).

<sup>312</sup> *Ibid* ss 67 and 68; see also Explanatory Memorandum, Enhancing Online Safety for Children Bill 2014, 3.

<sup>313</sup> *BSA* sch 7, cls 20 and 21 respectively.

<sup>314</sup> See also the National Classification Code (May 2005) F2005L01284. For background on the Australian classification scheme generally, refer to Australian Government, *Australian Classification* <<http://www.classification.gov.au/Information/Pages/Home.aspx>>.

<sup>315</sup> *BSA* sch 7, cl 47.

<sup>316</sup> *Ibid*, cl 56.

relevant take-down notice or cessation notice constitutes contravention of a designated content/hosting service provider rule,<sup>317</sup> which can give rise to both criminal and civil liability.<sup>318</sup> Where content is prohibited or potentially prohibited and where it is hosted outside Australia, the e-Safety Commissioner has certain options, including, in sufficiently serious cases, referral to a law enforcement agency.<sup>319</sup>

In addition to the regulation of prohibited and potentially prohibited content, the BSA also provides for and encourages the development of internet codes of practice.<sup>320</sup> A report prepared in 2012 by the Cyberspace Law and Policy Centre at the University of NSW identified thirteen codes of practice in relation to online activity that were then in force in Australia, seven of which were registered with a regulator.<sup>321</sup> Two of the codes previously registered with ACMA are now the responsibility of the e-Safety Commissioner, namely the Internet Content Services Code, developed by the Internet Industry Association, and the Codes for Industry Co-Regulation in Areas of Internet and Mobile Content.<sup>322</sup> According to Connolly and Vaile, the general objectives of the Internet Content Services Code are to 'promote safer online experiences for the community (particularly children)' and to provide guidelines to designated providers in relation to complaints handling, the removal of notified content or content services, the promotion of online safety for Australian families, the implementation of restricted access systems for certain content services and the regulation of certain chat services.<sup>323</sup> Connolly and Vaile write that the relevance of this Code is 'in its regulation of content hosting which occurs outside of Australia. The Code outlines the scheme to notify suppliers of IIA

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<sup>317</sup> Ibid sch 7, cls 52(6) and s 60(4) respectively.

<sup>318</sup> Ibid, cls 106, 107.

<sup>319</sup> Ibid, sch 5, cl 40.

<sup>320</sup> Ibid, sch 7, pt 4; see also ACMA, *Online Codes* (15 July 2012) <<http://www.acma.gov.au/Industry/Internet/e-Security/Australian-Internet-Security-Initiative/online-codes>>.

<sup>321</sup> Chris Connolly and David Vaile, 'Drowning in Codes: An Analysis of Codes of Conduct Applying to Online Activity in Australia' (Report, Cyberspace Law and Policy Centre, University of NSW, March 2012) 5. The report identified six codes registered with ACMA and one code registered with ASIC: 5 (2.3 Registration Status). However, two of the codes registered with ACMA have since been deregistered, namely, the Australian eMarketing Code of Practice (ACMA, *Australian eMarketing Code of Practice: Code Deregistration* <<http://www.acma.gov.au/Industry/Marketers/Anti-Spam/Ensuring-you-dont-spam/australian-emarketing-code-of-practice-ensuring-you-dont-spam-i-acma>>) and the Internet Industry Spam Code of Practice (ACMA, *Spam Code of Practice* <<http://www.acma.gov.au/theACMA/Library/Industry-library/Marketers/spam-code-of-practice>>).

<sup>322</sup> IIA, *Codes for Industry Co-Regulation in Areas of Internet and Mobile Content (Pursuant to the Broadcasting Services Act 1992)* (Version 10.4, May 2005) <[http://www.commsalliance.com.au/\\_\\_data/assets/pdf\\_file/0003/44607/Internet-Industrys-Code-of-Practice-Internet-and-mobile-content-ContentCodes10\\_4.pdf](http://www.commsalliance.com.au/__data/assets/pdf_file/0003/44607/Internet-Industrys-Code-of-Practice-Internet-and-mobile-content-ContentCodes10_4.pdf)>. Responsibility for the Content Services Code, the IIA Codes for Industry Co-Regulation in Areas of Internet and Mobile Content, and the Interactive Gambling Code was taken over from the IIA by the Communications Alliance Ltd pursuant to an agreement on 24 March 2014, and the Communications Alliance reports that it be reviewing these codes: Communications Alliance Ltd, *Internet Service Provider Industry* <<http://www.commsalliance.com.au/Activities/ispi>>.

<sup>323</sup> Connolly and Vaile, above n 321, 15.

[Internet Industry Association] Family Friendly Filters with information on prohibited or potentially prohibited content. It also requires an ISP to make available the use of IIA Family Friendly Filters for charge.<sup>324</sup>

Compliance with a registered code of practice is generally voluntary, although the e-Safety Commissioner does have the power to direct compliance in certain circumstances.<sup>325</sup> Failure to comply with a direction can result in criminal and civil liability for the content/hosting service provider.<sup>326</sup>

Limitations of the regulatory scheme relating to online content were considered by the ALRC in its report into Australian Privacy Law and Practice, *For Your Information*. The report noted that the dependence of the take-down scheme upon the classification of material in accordance with the National Classification Code limits the extent to which it can be used to provide an effective remedy for a person who has had privacy invasive material posted that would not be considered prohibited or potentially prohibited.<sup>327</sup> Further, jurisdictional considerations mean that ACMA has limited powers to regulate content hosted or provided outside of Australia.<sup>328</sup>

## E Criminal Law

There are a range of criminal laws that impact the taking or publication and use of images. These include laws relating to surveillance devices,<sup>329</sup> legislation relating to 'stalking', 'harassment' and 'assault', including cyberbullying,<sup>330</sup> and laws related to voyeurism and

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<sup>324</sup> Ibid 27.

<sup>325</sup> BSA sch 5, cl 66; sch 7, cl 89.

<sup>326</sup> Ibid, sch 5, cls 82, 83; sch 7, cls 106, 107.

<sup>327</sup> ALRC, *For Your Information*, above n 125, vol 1, 456 [11.11].

<sup>328</sup> Ibid 457 [11.12].

<sup>329</sup> All jurisdictions regulate the use of listening devices but only some jurisdictions regulate optical surveillance devices: *Surveillance Devices Act 2004* (Cth); *Surveillance Devices Act 2007* (NSW); *Surveillance Devices Act 2007* (NT); *Listening and Surveillance Devices Act 1972* (SA) (optical surveillance devices regulated only in the context of their use arising from installation under warrant, and use of an optical surveillance device to record a private activity is not prohibited); *Surveillance Devices Act 1999* (Vic); *Surveillance Devices Act 1998* (WA).

<sup>330</sup> 'Stalking' offences set out in criminal legislation of each state and territory, with the exception of Western Australia, will apply to conduct that would reasonably be expected to intimidate or harass, where a person has the intention to cause to cause harm or to arouse apprehension or fear on the part of the victim: *Crimes Act 1900* (ACT) s 35; *Crimes Act 1900* (NSW) s 545B; *Crime (Domestic and Personal Violence) Act 2007* (NSW) s 13; *Criminal Code 1983* (NT) s 189; *Criminal Code 1899* (Qld) s 359B; *Criminal Law Consolidation Act 1935* (SA) s 19AA; *Criminal Code 1924* (Tas) s 192; *Crimes Act 1958* (Vic) s 21A. The stalking offence in Western Australia is more limited in that, to be guilty of the offence of stalking, a person must have pursued another with intent to intimidate: *Criminal Code 1913* (WA), s338E. The *Criminal Law Consolidation Act 1935* (SA) ss 19 and 20 contains provisions relating to unlawful threats that make it an offence to threaten a person by words or conduct. Arguably therefore a threat may be communicated by way of an image. Section 19(3) states that a threat can be made 'directly or indirectly' and communicated by 'words or conduct'. As Langos has pointed out, this allows the provision to 'operate in the cyber context alongside the physical context envisaged upon its initial drafting': Colette Langos, *Cyberbullying, Associated Harm and the Criminal Law* (PhD Thesis, University of South Australia, 2013) 180. Section 20 also makes it an offence to threaten by 'words or conduct'. Accordingly, that provision is likely broad enough to apply to threats made by way of



indecent filming.<sup>331</sup> Some states have specific legislation governing the unlawful publication or distribution of images;<sup>332</sup> and in 2016 a private members bill was

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images: Google Australia Pty Ltd, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 7 March 2014, 22 and Langos at 185. Otherwise a threat communicated by way of image is unlikely to constitute criminal assault: Google Australia Pty Ltd, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 7 March 2014, 22, although note that *Criminal Code 1983* (NT) refers to threats by movement or words. See also *Crimes Act 1900* (NSW) s 60E dealing with assault, stalking, harassment or intimidation of a school student or staff member while at school. At the federal level, the *Criminal Code 1995* (Cth) provides that a person is guilty of an offence if they use a carriage service 'in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive': *Criminal Code Act 1995* (Cth), s 474.17. A number of other provisions of the *Criminal Code Act 1995* (Cth) cover offences involving a carriage service, including using a service to make threats to kill or cause serious harm (s 474.15).

<sup>330</sup> Google Australia Pty Ltd, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 7 March 2014, 22, although note that *Criminal Code 1983* (NT) refers to threats by movement or words. See also *Crimes Act 1900* (NSW) s 60E dealing with assault, stalking, harassment or intimidation of a school student or staff member while at school

<sup>331</sup> Criminal offences relating to voyeurism and indecent filming exist in a number of Australian jurisdictions. For an overview of these offences see Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper (2005), 16–20 and Appendix 1; see also NSWLRC, Consultation Paper, above n 36, 60–2. In Queensland, the Criminal Code involves an offence of observing or recording images of another person, without their consent, in circumstances where a reasonable person would expect to be afforded privacy and while the other person is in a private place or engaging in a private act and 'where the observation or visual recording is made for the purpose of observing or visually recording a private act': *Criminal Code 1899* (Qld) s 227A(1) and see s 227A(2), which makes it an offence to distribute prohibited recordings. Similar offences exist in Tasmania and South Australia: *Police Offences Act 1935* (Tas), s 13A; *Summary Offences Act 1953* (SA) Part 5A, which includes offences relating to humiliating or degrading filming, distribution of an invasive image and indecent filming. NSW and Victoria also include offences of a similar nature, but they are less wide-ranging than those already mentioned. For example, the *Crimes Act 1900* (NSW) s 91K makes it an offence to film someone engaged in a private act without that person's consent (and knowing the person does not consent) for the purpose of sexual arousal or sexual gratification; the *Summary Offences Act 1966* (Vic) Division 4A sets out an offence relating to the observation with a device or visual recording of a person's anal or genital area when it would be reasonable for a person to expect that region to be unobserved. These offences do not apply, however, where the person being filmed has consented to being filmed. Accordingly, they will not apply to situations where images were made with consent but later distributed or published without consent.

<sup>332</sup> See *Crimes Act 1900* (NSW) s 578C, which makes it an offence to publish 'indecent' articles. This offence was used to successfully prosecute a person who, in 2011, had posted six nude photographs of his former partner on his Facebook page: *Police v Ravshan Usmanov* [2011] NSWLR 40. In Tasmania the *Police Offences Act 1935* s 13B makes it an offence to publish or distribute a 'prohibited visual recording'. A prohibited visual recording is defined as a visual recording of a person 'in a private place or engaging in a private act made in circumstance where a reasonable adult would expect to be afforded privacy' or 'a visual recording of a person's genital or anal region, when it is covered only by underwear or bare, made in circumstances where a reasonable adult would expect to be afforded privacy in relation to that region'. The definition of distribute is wide enough to include posting online (s 13B(2)). In Victoria it is an offence under the *Summary Offences Act 1966* (Vic) s 41DA (1) intentionally to distribute an 'intimate image' of another person, where the distribution of the image is 'contrary to community standards of acceptable conduct'. However, it is not unlawful to distribute an intimate image if the person depicted is an adult and has expressly or impliedly consented to its distribution (*Summary Offences Act 1966* (Vic) s 41DA(3)). An intimate image is defined as a moving or still image that depicts a person engaged in sexual activity or depicts a person in a sexual manner or context or depicts the genital or anal region of a person or, in the case of a female, the breasts. An example given in the legislation of an offence under this section is where a person posts to social media a photograph depicting another engaged in sexual activity: *Summary Offences Act 1966* (Vic) s 41DA(1). The Act also makes it an offence to threaten to distribute such images: *Summary Offences Act 1966* (Vic) s 41DB.

introduced into federal parliament, which sought to amend the Commonwealth Criminal Code so that it would apply to the publication of sexual and intimate images.<sup>333</sup> At present, the Bill is not proceeding but could be reintroduced.<sup>334</sup> A range of other criminal offences prohibit publication of images — or even the taking of an image — in certain circumstances. Mostly these prohibitions relate to the capture or publication of images that are offensive or indecent, or would constitute an offence under child pornography laws.<sup>335</sup>

As noted by the ALRC, one of the limitations of the criminal law in addressing issues with the unauthorised taking or distribution of images of individuals is that many of the criminal offences involve elements of private activity or depend upon an expectation of privacy and are not therefore generally applicable where images are captured in a public place.<sup>336</sup> An additional limitation is that while the criminal law generally regulates the capture or publication of offensive images, the laws do not apply where the images themselves are inherently non-offensive but are used in a way which is offensive, for example, where they are used for the purpose of sexual gratification. In respect of non-offensive images used in a way that is offensive there has been limited success on the part

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<sup>333</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 October 2015, 10691–5 (Tim Watts). The Criminal Code Amendment (Private Sexual Material) Bill 2015 would amend the Criminal Code to make it an offence to use a carriage service to transmit and make available ‘private sexual material’. This offence is intended to cover a range of material — including that which depicts a person who is engaged in a sexual pose or sexual activity, or which depicts certain parts of the body — and in all cases where there is a reasonable expectation of privacy in relation to the material: Criminal Code Amendment (Private Sexual Material) Bill 2015 (Cth). The maximum penalty proposed for that offence is three years’ imprisonment. The Bill also seeks to create other offences, including the making of threats to upload or transmit private sexual material.

<sup>334</sup> The Criminal Code Amendment (Private Sexual Material) Bill 2015 (Cth) lapsed due to prorogation on 15 April 2016 and is currently not proceeding: Parliament of Australia, *Criminal Code Amendment (Private Sexual Material) Bill 2015 (Cth)* <[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r5552](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5552)>. However, it is possible that a motion to resume proceedings in relation to this Bill could be introduced: Parliament of Australia, House of Representatives Practice, 6<sup>th</sup> Ed, HTML Version, [http://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/Practice6/Practice6HTML?file=Chapter10&section=06&fullscreen=1](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice6/Practice6HTML?file=Chapter10&section=06&fullscreen=1), Lapsed Bills, Chapter 10 (Legislation). The Federal Minister for Women (as at May 2016), Michaelia Cash, has said that the Commonwealth will review Commonwealth, state and territory legislation to ‘ensure it adequately criminalises the distribution of intimate material ... without the victim’s consent’: Jorge Branco, ‘Revenge Porn Laws Needed “Sooner Rather than Later”’ *The Age* (online) 7 February 2016 <<http://www.theage.com.au/queensland/revenge-porn-laws-needed-sooner-rather-than-later-20160204-gmm432.html>>. The NSW Government has recently announced that it will move to criminalise the distribution of intimate or sexually explicit images without consent: NSW Government, Justice, *Moving Ahead on New Law to Stop Revenge Porn*, 5 September 2016 <http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2016/Moving-ahead-on-new-law-to-stop-revenge-porn.aspx>.

<sup>335</sup> A detailed consideration of the various offences that govern the posting of certain images is beyond the scope of this thesis. However, an overview can be found in SCAG, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper, August 2005, 16–20; see also ALRC, *For Your Information*, above n 125, 2330–1 [69.119]–[69.120]; NSWLRC, Consultation Paper, above n 36, 60–62 outlining offences against the person in NSW. More recently, see an overview of indecent filming laws applicable to South Australia in Langos, above n 330, 210–15 and 233–44 (regarding filming offences).

<sup>336</sup> ALRC, *For Your Information*, above n 125, 2330 [69.120].

of the law enforcement agencies in prosecuting individuals capturing the images and even less success in effecting the removal of material from the internet.<sup>337</sup> This is the case even where those images are of children.

One of the obvious limitations of stalking offences for someone who has had images of themselves posted online without their consent is that the person posting the images must be proven to have the requisite intention: that is, either an intention to cause the victim physical or mental harm, or to cause the victim to apprehend or fear physical or mental harm (or which amounts to conduct that is intimidating or, in the case of federal laws, menacing, harassing or offensive).

In terms of the cyber-harassment offences under Commonwealth law, the ALRC noted in its 2014 report that there have been to date 374 successful prosecutions. However, the ALRC in its consultations had 'heard concerns that state and territory police may be unwilling or unable to enforce criminal offences due to a lack of training and expertise in Commonwealth procedure which often differs significantly from state and territory police procedure.'<sup>338</sup>

A more general limitation of criminal law in providing redress for individuals who have had unauthorised images of themselves captured or distributed is that the criminal law is public rather than private law. In some cases an individual has the right to commence a private prosecution in respect of the alleged commission of a criminal offence.<sup>339</sup> However, even where such right exists, prosecutions are rare, can be expensive to pursue<sup>340</sup> and present the risk of an adverse costs order.<sup>341</sup> An individual may also have the right to bring a private law action in order to enforce an offence by way of injunction and/or to obtain a compensatory remedy in relation to the offence. Whether this right is available depends on the legislation creating the offence — legislation may expressly grant this right or the court may construe the statute as impliedly granting a private law

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<sup>337</sup> Ibid [69.121.]

<sup>338</sup> ALRC, *Serious Invasions of Privacy*, above n 11, 307 [15.42].

<sup>339</sup> See, for example, *Crimes Act 1913* (Cth) s.13. Whether such a right exists depends on the jurisdiction; so, for example, *Criminal Procedure Act 2004* (WA) s.20(5) provides that individuals are not able to commence prosecution unless another written law expressly authorises this; and will also depend on the nature of the offence. According to Garkawe the right to bring a private prosecution may exist in relation to summary prosecutions but in the case of indictable offences, individuals are able to proceed only so far as a preliminary examination, from which point the Director of Public Prosecutions or the Court will decide whether the matter is further proceeded with: Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) 17(2) *University of New South Wales Law Journal* 595, 598. Additionally, certain proceedings can only be initiated with the consent of the Attorney-General: see, eg, *Criminal Code 2002* (ACT) s 726; *Surveillance Devices Act 2007* (NSW) s 54, or with the consent of the Director of Public Prosecutions: see, eg, *Criminal Code Act Compilation Act 1914* (WA) s345(6).

<sup>340</sup> See, eg, Belinda Kontominas, 'Opponents are Free to Launch Legal Action' *Sydney Morning Herald* (online), 1 February 2010 <<http://www.smh.com.au/national/education/opponents-are-free-to-launch-private-action-20100131-n6m9.html>>; South Eastern Centre against Sexual Assault, *Private Prosecutions* <<http://www.secasa.com.au/pages/taking-legal-action/private-prosecutions/>>.

<sup>341</sup> *Latoudis v Casey* (1990) 65 ALJR 151.

right of action<sup>342</sup> — or on whether the individual is considered to have a ‘special interest’.<sup>343</sup> Where an individual is the victim of a criminal offence, they may also be entitled to receive compensation under a criminal injuries compensation scheme.<sup>344</sup> There is also the possibility of a compensation or reparation order being made by a court in favour of a victim of crime,<sup>345</sup> although such orders are apparently rare.<sup>346</sup> Garkawe notes that cases can be dropped or a plea accepted by the prosecutors without any consultation with the victim, and that whether or not the victim is kept informed about developments in the case is dependent largely on the discretion of the police, prosecutors and judges.<sup>347</sup> Aside from this, criminal law does not necessarily provide a means by which unauthorised images posted online can be removed from the internet. The ability to secure removal of such images will generally depend upon whether the images constitute prohibited content under the BSA, discussed above.<sup>348</sup>

Nevertheless, as was observed by the NSWLRC, criminal sanctions may punish or deter invasions of privacy and ‘need to be acknowledged and recognized as part of the overall regulation of privacy’.<sup>349</sup>

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<sup>342</sup> As to the considerations that will apply in determining whether or not legislation establishing a criminal offence also creates a private right of action see *King v Goussetis* (1986) 5 NSWLR 89, 93 (McHugh J) and *Pillay T/As West Corp Mortgage Market v Nine Network Australia Pty Limited* [2002] NSWSC 983, [16]–[17] and cases referred to at [16]. Butler suggests that *Grosse* (2003) Aus Torts Reports ¶81-706 and cases such as *Khorasandjian v Bush* [1993] QB 727 were judicial attempts to provide civil remedies to compensate criminal offences where, presumably, the relevant statute may not have created such a private right of action in itself: Butler, above n 59, 372.

<sup>343</sup> *King v Goussetis* (1986) 5 NSWLR 89, 93–4 (McHugh J); *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs* (1995) 185 CLR 552; and see *Pillay T/As West Corp Mortgage Market v Nine Network Australia Pty Limited* [2002] NSWSC 983, [22]–[27].

<sup>344</sup> Each state and territory has a compensation scheme for victims of crime: *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victims’ Rights and Support Act 2013* (NSW); *Victims of Crime Assistance Act 2006* (NT); *Criminal Offence Victims Act 1995* (Qld); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (Tas); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Injuries Compensation Act 2003* (WA). However, as noted by the NSWLRC, compensation may not be available for mere distress and humiliation and there are limits to the amount of compensation available: NSWLRC, Consultation Paper, above n 36, 23.

<sup>345</sup> *Crimes (Sentencing) Act 2005* (ACT) s 18, ch 7; *Victims Rights and Support Act 2013* (NSW) Part 6; *Sentencing Act 1995* (NT) s 88; *Penalties and Sentences Act 1992* (Qld) s 35; *Criminal Law (Sentencing) Act 1988* (SA) Part 7; *Sentencing Act 1997* (Tas) s 68; *Sentencing Act 1991* (Vic) ss 84, 85B; *Sentencing Act 1995* (WA) ss 117, 120.

<sup>346</sup> Morabito, writing in 2000, notes that in respect of reparation orders made at the Commonwealth level, the major beneficiaries of such orders are the Commissioner or Taxation, and to a lesser extent, the Department of Social Security, rather than the victims of crime: see Vince Morabito, ‘Compensation Orders Against Offenders – An Australian Perspective’ (2004) 4 *Singapore Journal of International and Comparative Law* 59, 61.

<sup>347</sup> Garkawe, above n 339, 597–8.

<sup>348</sup> See, however, forfeiture provisions in the relevant Surveillance Devices legislation, discussed above; see also *Criminal Code* 1899 (Qld) s 227B and *Police Offences Act 1935* s 11B, which make it an offence for a person to publish or distribute a prohibited visual recording; and see also *Criminal Code Act 1995* (Cth) s 474.25, which stipulates that Internet Service Providers or Content Hosts can be guilty of an offence for failing to report child pornography or child abuse material to the Australian Federal Police.

<sup>349</sup> NSWLRC, Consultation Paper, above n 36, 58.

## IV CHAPTER SUMMARY

This chapter has considered a range of legal causes of action that may, depending on the circumstances, be relied upon by an individual seeking to prevent or redress the unauthorised publication of an image of themselves. The availability of a cause of action will usually depend upon the image revealing something that can be judged, objectively, to be private or confidential or communicating something that is, when determined objectively, detrimental to a person's reputation or standing; or upon establishing that the image was captured in breach of a legal or equitable right, or a contractual obligation owed to the image subject. In each case the actual impact of publication upon the image subject is not a relevant factor in considering whether the cause of action is established, although it may be taken into account when determining an appropriate remedy. In this sense none of the causes of action discussed in this chapter are designed to protect a person's autonomy, in terms of providing them with a choice as to whether or not, or when, how and to whom, a particular image of themselves should be published.

Where images are published online without the authorisation of the image subject, the image subject may be able to seek redress by virtue of the complaints mechanisms offered by the relevant internet content host. However, these mechanisms often depend upon the image being one that infringes the image subject's *legal* rights, and in most cases the internet content host has no contractual obligation to remove particular images. Aside from any complaints procedures established by internet content hosts themselves, the *Online Safety Act* provides a mechanism by which children and young people (or those acting on their behalf) can complain to the e-Safety Commissioner about certain online content. This regime is designed only to assist in securing the removal of a very specific type of material, namely cyberbullying material targeted at an Australian child, and the scheme only applies in respect of social media services listed as Tier 1 or Tier 2 social media services.

Online content that has been collected or held in breach of the APPs established under the *Privacy Act* or which amounts to prohibited content under the *BSA* can give rise to liability on the part of the organisation collecting, holding or publishing the information. However, the information privacy and online content regimes do not create private causes of action for individuals, nor does an individual have standing to pursue breaches of the *Privacy Act*, or the making available of content that should be prohibited, but must instead rely upon making a complaint to the body overseeing the relevant regime. Additionally, neither the regime under the *Privacy Act* nor that created by the Broadcasting Services legislation regulate the conduct of private individuals.

Although a range of criminal offences may apply to a person who has published an image without the authorisation of the image subject, the offences generally depend upon the image being offensive or indecent, or upon the conduct of the publisher amounting to

stalking or harassment. Criminal offences certainly have a role in deterring or punishing the unauthorised publication of images in some situations but are of limited utility in giving individuals the ability to control how or whether their images are published. This is not least because the criminal process is essentially a public one and the ability of individuals to be direct participants within that process is limited.

Having highlighted the limitations of Australian law in providing an individual with 'control' over their image, the next chapter puts these limitations into context by presenting a number of hypothetical case studies relating to the capture and publication of images of children and young people. The aim is to illustrate some of the detail of the causes of action or other means of redress considered here, specifically as they would apply to the capture, publication and use of images of children and young people, and to highlight some of the complexities and 'grey areas'.



## CHAPTER FOUR – CASE STUDIES

### I INTRODUCTION

Chapter Three outlined some of the limitations of Australian law in providing an individual with the right to obtain redress for the unauthorised publication of an image. This chapter seeks to further illustrate the limitations of existing causes of action, and the complexities in applying some of the causes of action to individual situations, by considering a number of hypothetical scenarios, or case studies.

Although Chapter Three considered a number of cases that had been pursued through the courts, relying only on actual cases to illustrate the application of the law fails to anticipate the range of circumstances that may present themselves. The use of hypothetical cases, therefore, can be used to consider the implications of a given argument and to ‘reason in anticipation’ and, in this sense, have been described as a heuristic device.<sup>1</sup> For example, in relation to the law on breach of confidence, only a few Australian cases involve a claim of breach of confidence in relation to personal information,<sup>2</sup> such as through publication of personal information conveyed by an image. Therefore the extent to which the traditional elements of a breach of confidence would apply to the publication of an image can only be effectively explored by considering hypothetical situations rather than real cases.

Describing the boundaries of a legal cause of action is in many ways an easier task than applying the cause of action described to a particular scenario. This is because an application of law to a particular situation throws into relief some of the nuances or ‘complexities’ of the law. A hypothetical case can therefore be used to ‘focus attention on subtle or troublesome points’<sup>3</sup> and can assist in drawing distinctions between the ‘law-in-the-books’ and ‘law-in-action’.<sup>4</sup> Bench-Capon and Prakken describe the use of hypothetical situations in US Supreme Court cases to ‘close the gap’ between the abstract

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<sup>1</sup> Edwina L Rissland and Kevin D Ashley, ‘Hypotheticals as Heuristic Device’ (1986) *HLT ’86 Proceedings of the Workshop on Strategic Computing Natural Language* 165 (Association for Computational Linguistics, 1986) 165, 166.

<sup>2</sup> Jillian Caldwell, ‘Protecting Privacy Post-Lenah: Should the Courts Establish a New Tort or Develop Breach of Confidence?’ (2003) 26 (1) *University of New South Wales Law Review* 90, 114; Gavin Phillipson, ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act’ (2003) 66 *Modern Law Review* 726, 732.

<sup>3</sup> Rissland and Ashley, above n 1— although the authors were referring here to the use of hypotheticals in legal education the point is, it is submitted, equally applicable to legal scholarship.

<sup>4</sup> W Michale Reisman, Siegfried Wiessner and Andre R Willard, ‘The New Haven School: A Brief Introduction’ (2007) 32(587) *The Yale Journal of International Law* 587, 589.



terms in which laws tend to be expressed and the interpretation of those laws in light of fact-specific situations.<sup>5</sup>

The case studies are also presented here so as to enable some of the policy options considered later in this thesis to be illustrated and to some extent ‘tested’ by reference to the hypothetical scenarios. To what extent would the legal reforms proposed alter the legal outcome for the image subject? Where should ‘the line be drawn’?<sup>6</sup> For this purpose, the scenarios introduced in this chapter will be revisited in Chapter Six and reconsidered in light of the policy options discussed in this thesis. Illustrating the intended application of proposed law reforms by reference to hypothetical examples is a technique employed by various legislatures, law reform bodies and the judiciary.<sup>7</sup> Rissland has noted that in the field of law, examples are ‘crucial to reasoning’, and she notes that hypothetical case studies are used not only in teaching law but also to illustrate legal principles set out in codes.<sup>8</sup> In fact, the ALRC in its report on Australian privacy law and practice, *For Your Information*, uses a number of hypothetical examples to illustrate the types of invasions of privacy that should, in its view, fall within the bounds of the their recommended statutory cause of action for invasion of privacy.<sup>9</sup>

## II CHAPTER OUTLINE

The following part of this chapter, Part Three, explains the case study design and scope of this chapter. Part Four then introduces various scenarios and discusses the legal aspects arising from each. The chapter concludes in Part Five by summarising the limitations of existing Australian law in providing individuals with control over their image by reference to the salient aspects of the scenarios presented.

## III CASE STUDY DESIGN AND SCOPE

With one exception, the scenarios considered in this chapter are hypothetical.<sup>10</sup> However, a number of the scenarios have been created around actual photographs available on a public website.<sup>11</sup> Where this is the case, the photographs are included with the case study.

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<sup>5</sup> Trevor Bench-Capon and Henry Prakken, ‘Using Argument Schemes for Hypothetical Reasoning in Law’ (2010) 18(2) *Artificial Intelligence and Law* 153, 154.

<sup>6</sup> Ibid 157.

<sup>7</sup> For an example of this in an Australian judicial context see *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666 at 689 [82] (Nettle J) (drawing an analogy between the facts of the case and a hypothetical example of loss arising as a result of a bank robbery). This hypothetical example was further analysed in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10 [39]–[40] (French CJ, Hayne and Kiefel JJ) [74] (Bell and Gageler JJ). See also South Australian Law Reform Institute, *A Statutory Tort for Invasion of Privacy*, Report no 4, March 2016, 42–7, which uses hypothetical examples to illustrate the various ways in which individuals may experience an invasion of privacy and how existing laws deal with (or fail to provide redress for) that conduct.

<sup>8</sup> Edwina L Rissland, ‘Examples in Legal Reasoning: Legal Hypotheticals’ (1983) *IJCAI* 90, 90.

<sup>9</sup> ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 3, 2570.

<sup>10</sup> Case Study Three (Alison).

<sup>11</sup> Case Study Two (Tim); Case Study Three (Alison); Case Study Five (Tyger and Lilly).

The remainder of the case studies are closely based upon actual events described on the internet or in news reports, or which have been the subject of legal action.<sup>12</sup>

It would be an impossible task to present the full range of scenarios in which images of young people are taken and used. The scenarios selected for this chapter are therefore only intended as a snapshot. However, the scenarios have been designed to include a number of different variables, described in Part A below. These variables are used to highlight some of the particular issues and complexities of applying the existing law to the publication of images of children and young people. Nevertheless, the case studies do not necessarily 'give the whole picture', for example, the impact upon the image subject of the use to which the image is put is often not fully described or not described at all. Likewise the intentions of the person in publishing the image are not always clear. This is deliberate and designed to allow an exploration of how the legal outcome may differ depending on the way in which the facts present themselves.

## A Case Study Variables

### 1 Common Elements of Each Case Study

One thing that the case studies have in common is that the relevant image has been published online (although initial publication might have taken place offline). Lack of consent is also a common element in each case study. Some of the case studies involve publication of the image in question without the express prior consent of the image subject or, where there is more than one subject, without the express consent of all subjects. In other cases, although initial publication online was consented to (or at least not objected to), the image has been republished or used elsewhere without the express consent of the image subject, or where there is more than one subject, without the express consent of all. In one of the case studies (Case Study Five: Tyger and Lilly), the image subjects are very young children who may be considered to lack the capacity to consent to publication of their image, although it is the parent who has taken and first published the photograph online.

Another thing that all of the images have in common is that they depict children or young people under the age of 18. One of the scenarios involves a very young child,<sup>13</sup> two involve children in middle childhood,<sup>14</sup> and the remainder involve children who are in adolescence or approaching adulthood.<sup>15</sup> Selecting scenarios involving children at different stages of

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<sup>12</sup> Case Study One (Jackie); Case Study Four (Shabeeha); Case Study Six (Ben); Case Study Seven (Schoolboy Rowers).

<sup>13</sup> Case Study Five (Tyger and Lilly) — where Lilly is two years' old.

<sup>14</sup> Case Study Five (Tyger and Lilly) — where Tyger is six years' old, and Case Study Six (Ben). Berk defines middle childhood as ranging from 6 – 11 years: Laura E Berk, *Infants, Children, and Adolescents* (Allyn and Bacon, 4<sup>th</sup> ed, 2002) 5.

<sup>15</sup> Case Study One (Jackie); Case Study Two (Tim); Case Study Three (Alison); Case Study Four (Shabeeha); Case Study Seven (Schoolboy Rowers); Case Study Eight (Harry). Berk defines adolescence as ranging from

childhood is important for a number of reasons. First, the capacity of children to give true and informed consent to the capture or publication of an image, while to some extent subjective, depends also upon the age or stage of the child.<sup>16</sup> The extent to which an image subject is able to give informed consent is relevant in the context of the design of possible law reform options, and a lack of consent can increase the risk of harm to an image subject due to the relationship between autonomy and self-esteem explored in Chapter Two. Secondly, a determination of the extent to which a child's expectation of privacy can be assessed without reference to their parents may depend on the age of the child (this is discussed in Case Study Five (Tyger and Lilly)). Thirdly, the impact upon a child of the capture or publication of an image, while again having a subjective element, will also depend upon the age of the child.<sup>17</sup> Very young children are more likely to be unaware of the existence of an image in which they are the subject or one of the subjects. This is relevant because the impact of publication or use of an image is often related to an individual's awareness of that image and their perception of how others will react to it.<sup>18</sup> The fact that children have different sensitivities at different ages was recognised by Lord Dyson MR in the English case of *Weller and Ors v Associated Newspapers* (discussed in more detail in the context of Case Study Five) when he observed:

An older child may be able to exercise his autonomy in a similar way to adults and, in the words of Tugendhat J in *Spelman v Express Newspapers* [2012] EWHC 355 (QB) at para 55, they may create 'a personality and public profile of their own'. An older child is likely to have a greater perception of his own privacy and his experience of an interference with it might well be more significant than for a younger child.<sup>19</sup>

## 2 The Type of Image and Its Composition

Another variable is the type and composition of the image. Most of the case studies relate to photographic images, but video images are considered in two case studies.<sup>20</sup> Scenarios are presented involving images captured in a public place as well as images captured in a person's own home. Some of the case studies involve an image that depicts only one

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11-20 years of age: Ibid. However, for the purpose of this thesis, adulthood is considered to be 18 years of age and above.

<sup>16</sup> See ALRC, *For Your Information*, above n 9, 2265 [68.37].

<sup>17</sup> See, eg, Ferdinand Schoeman, 'Adolescent Confidentiality and Family Privacy' (1986–1987) 20 *The John Marshall Law Review* 641, 653 who suggests that 'privacy matters more to older children and is more central to their development and integrity than it is to younger children.'

<sup>18</sup> Although, as explained in Chapter Two, there may also be an impact on an image subject where the subject is not aware of the publication or use of an image but where that publication or use causes others to respond differently to the image subject (for example, by excluding him or her). The publication of images of even young children or those unaware of the publication can also have other impacts — such as on their safety and security, particularly if the child is the child of a celebrity. See, eg, *Weller and Ors v Associated Newspapers* [2015] EWCA Civ 1176 ('*Weller*'), Lord Dyson MR: '[i]nterference with a child's article 8 rights may also give rise to greater security concerns than it would in the case of the adult ... Where a child has a famous parent, this security and safety concern is arguable heightened even further.'

<sup>19</sup> [2015] EWCA Civ 1176, [31] (Lord Dyson MR, with Lords Justice Tomlinson and Bean in agreement).

<sup>20</sup> Case Study One (Jackie) and Case Study Six (Ben).

individual, but others involve an image depicting a pair or small group.<sup>21</sup> It is important to consider images depicting more than one individual because, where this is the case, there may be conflicting desires: one or more of the image subjects may wish to prevent publication, while the other subject or subjects may either not have an issue with publication or may actively desire publication to take place. Acknowledging these issues and factoring them into any law reform option is essential.

Some of the case studies revolve around images depicting nudity or semi-nudity. This is relevant because depicting nudity of children can implicate the criminal law and because nudity is also likely to be relevant in determining whether an image was confidential or one in respect of the capture or publication of which the image subject had a reasonable expectation of privacy.<sup>22</sup>

In addition, while most of the scenarios involve authentic images, that is, those that reveal no more or less than what was captured by the photographer without digital alteration, one scenario involves a non-authentic, digitally altered image.<sup>23</sup> The manipulation of an image that places the image subject in a different context can be said to portray the image subject in a 'false light'. It has been suggested that situations involving false light are more appropriately dealt with by the law of defamation;<sup>24</sup> therefore, that scenario is included here to illustrate the limitations of that approach.<sup>25</sup>

### 3 *The Context in Which the Image is Published or Used*

Another variable is the context in which the image in question is published or used. While some scenarios involve images that have been published on social media sites, one involves an image that has been used for advertising, and a number involve images used on a news service or as part of a news report. It was considered necessary to include at least one case study involving the use of an image in a commercial (advertising) context in order to consider the legal response to what is often termed an 'appropriation' of image or likeness. In recommending the form of a statutory cause of action for serious invasions of privacy, the ALRC did not expressly include appropriation in the list of examples of conduct amounting to an invasion of privacy. Indeed, members of the Australian judiciary, as well as academic commentators, have suggested that appropriation of an image cannot properly be categorised as an invasion of privacy at all.<sup>26</sup> While this chapter does not seek

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<sup>21</sup> Case Study Four (Shabeeha); Case Study Five (Tyger and Lilly); Case Study Six (Ben); Case Study Seven (Schoolboy Rowers).

<sup>22</sup> See, eg, views of Gleeson CJ in *Lenah* (2001) 208 CLR 199, 226 [42].

<sup>23</sup> Case Study Four (Shabeeha).

<sup>24</sup> See Case Study Four (Shabeeha), section 3(a).

<sup>25</sup> Case Study Four (Shabeeha).

<sup>26</sup> *Lenah* (2001) 208 CLR 199, 256 [125] (Gummow & Hayne JJ); see also ALRC, *For Your Information*, above n 9, 2565–6 [74.120]; Raymond Wacks, 'Why There Will Never Be an English Common Law Privacy Tort' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law* (Cambridge, 2010) 154, 177. But see Jonathan Morgan, 'Privacy, Confidence, and Horizontal Effect: "Hello" Trouble' (2003) 62 (2) *Cambridge Law Journal* 444, 450, arguing, in relation to appropriation of image or personality rights, that

to challenge that proposition, the commercial use scenario is included here to illustrate the consequence of denying a privacy-based remedy in such a situation. Including situations where images have been used in the context of news is necessary to illustrate, firstly, the exemptions enjoyed by media organisations from provisions of the *Privacy Act* and the ACL, and secondly the extent to which public interest considerations (particularly those of free speech and freedom of the press) might impact upon the availability of a remedy. In addition, including situations involving media use allows for a brief discussion on the self-regulation regime applicable to many Australian media organisations.

## B *Scope of this Chapter*

It is important to realise that in any individual case the desire to control whether and how a particular image is published can arise for many different reasons. A desire to prevent publication or to remove an image from the online environment might be a purely subjective response to the particular image itself: it may simply be that the image subject does not like the way they look, for example. In fact, numerous comments found online in blogs and internet chat rooms reveal young people are unhappy about the way they look in images of themselves posted to the internet.<sup>27</sup> It may be that what the image depicts causes the image subject to fear being judged by others; or it may be that the image subject feels violated by the publication of the image in question,<sup>28</sup> or resents the loss of control over how they are represented.<sup>29</sup> The desire to control publication of an image may, however, be a response to consequences ensuing from publication of a particular image: for example, an image may result in the image subject being teased or even bullied.<sup>30</sup> However, the case studies in this chapter do not always consider the reason why the individual concerned wishes to have control over the online publication

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‘two discrete interests, commercial and dignitary, are aspects of the same legal concern (protection of image), but crucially, they are separable.’

<sup>27</sup> See, for example, the following: Facebook, *What if I don't like a photo I'm tagged in?*, <<https://www.facebook.com/help/212466865441659>>; Bunny, *My Friend Keeps Posting Ugly Pictures of Me on Instagram?*, Yahoo!Answers, Family and Relationships, Friends <<https://answers.yahoo.com/question/index?qid=20130111224424AAvQGCo>>; David Eddie, ‘My Partner's Sister Posted an Unflattering Photo of Me and Won't Take it Down. What Do I Do?’, *Life, Relationships, The Globe and Mail Online*, 23 July 2015, <<http://www.theglobeandmail.com/life/relationships/my-partners-family-wont-take-down-a-facebook-picture-what-do-i-do/article25643789/>>.

<sup>28</sup> See, eg, Amanda Todd, *Amanda Todd's Story: Struggling, Bullying, Suicide, Self-Harm*, Chia Videos (11 October 2012) <https://www.youtube.com/watch?v=ej7afkypUsc>; see also Laura Trevelyan, ‘Shock at Student's Suicide over Sex Video’, *BBC News* (online), 4 October 2010 <http://www.bbc.co.uk/news/world-us-canada-11464617>.

<sup>29</sup> See, eg, *Andrews* (Unreported, High Court of New Zealand, Allan J, 15 December 2006) where the court noted that the couple who were depicted in a video broadcast as part of a TV documentary experienced ‘chagrin and annoyance at not being advised they were being filmed at close range, either at the time or later.’

<sup>30</sup> See, eg, ‘Star Wars Kid is Top Viral Video’, *BBC News* (online), 27 November 2006 <http://www.bbc.co.uk/2/hi/entertainment/6187554.stm>.

of their image (where this is the case)<sup>31</sup> nor do they consider the consequences that can ensue from not having control, although these issues were explored in Chapter Two.

As with the preceding chapter, the purpose at this stage is not to make a judgement on the value of the claim to control, nor to consider the most *appropriate* remedies or forms of redress, but rather to describe and illustrate the existing legal situation and to highlight some of the complexities or ‘grey areas’ in applying the law to the scenarios described.

Not every legal action or area of law discussed in the preceding chapter is considered in reference to each case study. Instead, discussion is confined to those causes of action or avenues of address that the plaintiff (or their lawyers) would at least consider arguing on the facts, or in respect of which the plaintiff would have standing.

With the exception of Case Study Three (Alison), the case studies do not involve the use of an image in a commercial context (other than a media context), so actions for injurious falsehood, passing off and misleading and deceptive conduct are not considered other than in the discussion of law applicable to Case Study Three.

None of the case studies involves a direct contractual relationship between the image subject and the person capturing the image, so contractual issues are not addressed except to consider whether the image subject may have a remedy based upon an internet content host’s terms and conditions.

Likewise, none of the scenarios involves an interference with proprietary interests, so actions in trespass and nuisance are also not considered. Although some of the scenarios might give rise to questions of copyright infringement vis-a-vis a person reproducing an image and the person who captured it, in none of the scenarios discussed is the image subject the owner of the copyright.<sup>32</sup> Therefore, copyright is not considered in respect of any of the case studies.

In most case studies the nature of the image will not be considered ‘prohibited’ or ‘potentially prohibited’ under the national classification scheme, in which case the e-Safety Commissioner has no grounds upon which to issue a take-down notice under the BSA. Therefore this area of internet regulation is not discussed except in relation to those situations where it is possible that the image itself could be classified as prohibited or potentially prohibited were it to be submitted for classification.

In most of the scenarios either the nature of the image or the conduct in capturing and publishing the photograph will not attract criminal liability. As such, criminal offences are

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<sup>31</sup> One of the case studies involves a very young child — Case Study Five (Tyger and Lilly) where Lilly is two years’ old and therefore too young to be aware of the existence online or use of the image.

<sup>32</sup> Unless an argument can be made based on the existence of a constructive trust — see further the discussion in Chapter Three, Part Three (Intellectual Property).

only considered where it is possible that liability would attach to the person capturing and publishing the image.

In considering the availability of private law actions to the image subjects in the following case studies, it must be borne in mind that in practice commencing any formal legal proceedings is necessarily complex and expensive. What is more, if the person responsible for initial publication of the images in question is not resident in Australia, or if their identity or their whereabouts in Australia is not known, these difficulties can be insurmountable. In such cases liability might attach to an internet intermediary, so the potential liability of an intermediary is discussed where relevant.

#### IV CASE STUDIES

This part sets out eight case studies. After presenting each case study, there is discussion of background issues and key features, before a discussion of possible legal avenues of redress for the image subject or subjects (as the case may be).

##### A *Case Study One (Jackie)*

###### 1 *Scenario*

Jackie is 14 and spends lots of time in various internet chat rooms. One day she ‘meets’ a boy, Lenin, and they communicate, first in the chat room, later by exchanging emails, becoming ‘friends’ on Facebook and finally by ‘Skyping’ each other. Although both Jackie and Lenin live in Perth, Western Australia, they have never met each other in person. Jackie believes that Lenin is 16 years old, as said on his profile, but in actual fact he is 24. Over the course of a few weeks, the Skype sessions become more and more frequent and the two develop an increasingly intimate relationship. One day Lenin asks Jackie to show him her breasts, which she does. Unbeknown to Jackie, Lenin is recording the Skype session, which he retains as a video. In subsequent Skype sessions, Lenin makes further requests to Jackie to show him her body, which she does, and which Lenin records (again, without Jackie’s knowledge). However, after some time Jackie begins to feel uncomfortable with this and decides to end the ‘relationship’ with Lenin. However, Lenin does not want to end things. He informs Jackie that he has several videos of her showing her breasts and revealing other parts of her body. He threatens Jackie that if she does not continue to Skype him, and if she does not show him more of her body, he will upload the videos of her to YouTube and will identify her by name.



**Figure 3: Still image from Amanda Todd's YouTube video<sup>33</sup>**

## 2 Background and Key Features

While this is a hypothetical scenario, it is based on a number of real-life scenarios, with parallels to the story of Amanda Todd (Figure 3), discussed in Chapter Two.<sup>34</sup> This scenario is almost identical to one of the composite case studies included in a cyberbullying research report to illustrate the types of cyberbullying incidents that have been dealt with by the National Children's and Youth Law Centre at the University of NSW.<sup>35</sup> The scenario also bears some similarity to the experiences of Alla Giller and Caroline Wilson, both of whom successfully sued their former partners for breach of confidence in relation to the distribution of intimate personal images.<sup>36</sup> Nevertheless, there are important differences between the situation described in this scenario and the circumstances of Giller and Wilson. One difference is that Giller and Wilson were adults at the time the images were recorded and released, whereas Jackie is a minor. Moreover, both Giller and Wilson were aware (or subsequently became aware) that their partner was capturing or had access to intimate images of them and both of them consented to that (either simultaneously or retrospectively) — albeit on the understanding that the images were not to be shown to anyone else. In Jackie's case, she was unaware that she was being filmed and even if Jackie is considered to have capacity to consent to this (discussed below), she did not consent. In the case of *Giller* and *Wilson*, intimate images were distributed to others against the plaintiff's wishes. In Jackie's case, there is a threat to distribute such images but they have not been distributed.

The case study notes that Lenin is an adult posing as a child. A literature review on child grooming published by the Australian Institute of Criminology made reference to a survey conducted in 2005/2006 among Irish schoolchildren. That survey revealed that 7% of participants had arranged to meet face-to-face with a person who they had only

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<sup>33</sup> Amanda Todd, above n 28.

<sup>34</sup> See also Christina Ng, 'Bullied Teen Leaves behind Chilling YouTube Video', *abcnews.go.com*, 12 October 2012 <<http://abcnews.go.com/International/bullied-teen-amanda-todd-leaves-chilling-youtube-video/story?id=17463266>>.

<sup>35</sup> Matthew Keeley et al, *Research on Youth Exposure to, and Management of, Cyberbullying Incidents in Australia: Part B - Cyberbullying Incidents Involving Australian Minors, the Nature of the Incidents and How They Are Currently Being Dealt With*, (SPRC Report 10/2014) Sydney: Social Policy Research Centre, UNSW, Australia, 89–90.

<sup>36</sup> *Giller* (2008) 24 VR 1; *Wilson* [2015] WASC 15 (16 January 2015). *Giller* also involved the threatened distribution of images. *Giller* (2008) 24 VR 1 [1].



previously come to know ‘online’ and that of those children 24% reported that the person they met, that person having introduced themselves online as a child, turned out to be an adult.<sup>37</sup>

### 3 *Discussion of the Law*

The following sections discuss various private law remedies that will be available to Jackie, as well as whether Lenin would be guilty of a criminal offence.

#### *(a) Action for Invasion of Privacy*

If a common law action for invasion of privacy is recognised, the likely elements of this are would almost certainly be satisfied.<sup>38</sup> Jackie would need to establish that a person in her position would have a reasonable expectation of privacy vis-a-vis the capture of the images, as well as the publication or threatened publication of them. In determining that there is a reasonable expectation of privacy, it is relevant that Jackie did not know that she was being filmed (and cannot be said to have consented to this) — there has therefore been an intrusion upon her seclusion.<sup>39</sup> It is also relevant that the images depict her engaged in what would reasonably be expected to be and remain a private exchange between two people. As the images are intimate, and have been captured in a situation involving an intrusion upon her seclusion, there is an expectation of privacy vis-a-vis the capture and publication of the images. The intrusion into her seclusion and the disclosure or threatened disclosure would also likely be considered highly offensive to a reasonable person of ordinary sensibilities in Jackie’s position. This is not least because the images are of a minor and were obtained without the subject’s knowledge and consent, in breach of trust and (in relation to some of the images) as a result of coercion. The elements of intention, lack of consent and lack of a public interest defence or justification on Lenin’s part are all easily established. If actual harm is a necessary element of the action,<sup>40</sup> Jackie is likely to be able to establish this. This is because the threat of publication and any actual publication that did take place would likely give rise to mental, physiological or emotional harm or distress on Jackie’s part. The threats to reveal the intimate images also prevent or hinder Jackie from doing an act that she is lawfully entitled to do.<sup>41</sup>

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<sup>37</sup> Kim-Kwang Raymond Choo, *Online Child Grooming: a Literature Review on the Misuse of Social Networking Sites for Grooming Children for Sexual Offences* (Australian Institute of Criminology Research and Public Policy Series, Report 103) 2009, xi.

<sup>38</sup> Given that the tort has been recognised in only two lower court decisions, the elements of and defences to the action have not been established and it is only possible to speculate on what they might be: as to this, see the discussion in Chapter Three, Part Three (Common Law Action for Invasion of Privacy).

<sup>39</sup> Recall that the ALRC notes that intrusion upon seclusion will ‘usually involve watching, listening to, or recording someone’s private activities or private affairs’: ALRC, *Serious Invasions of Privacy in the Digital Era*, Report no 123 (2014), 73 [5.2]. See further Chapter Three 105-106.

<sup>40</sup> *Grosse* (2003) Aus Torts Reports ¶181-706, 64,187 [444] (Skoien DCJ).

<sup>41</sup> This was a form of detriment according to Skoien DCJ in *Grosse* (2003) Aus Torts Reports ¶181-706, 64,187 [444].

If Jackie is able to establish a prima facie cause of action for invasion of privacy, interlocutory injunctive relief is likely to be available to her. An internet content host would possibly face an action for invasion of privacy if they failed within a reasonable time to remove material which they became aware of, and which constituted an invasion of privacy.<sup>42</sup> The hosting of content such as this would contravene the terms and conditions of the YouTube service itself, so notification to YouTube in this case would probably result in the content being removed. However, if the video was republished to the internet by other users, there are enormous practical difficulties in effecting its removal.

### *(b) Breach of Confidence*

As mentioned above, Jackie's situation is somewhat similar to that of both Alla Giller and Caroline Wilson. Giller and Wilson were both successful in their respective breach of confidence actions against a former partner who had distributed and threatened to distribute intimate images of them. In *Giller v Procopets*, videotapes of Giller and her partner engaging in sexual activities were found to constitute confidential information.<sup>43</sup> The court held that the defendant was under an obligation in respect of this confidential information; an obligation that arose from the circumstances and the nature of their relationship.<sup>44</sup> As Gillard J observed:

In my view persons indulging in a sexual activity in the privacy of their own home create a confidential relationship during such activity. In my view it is difficult to think of anything more intimate than consensual sexual activities between two parties in the privacy of their home.<sup>45</sup>

In *Wilson*, there was also no question that the intimate images were confidential and Mitchell J observed that '[i]ntimate photographs and videos taken in private and shared between two lovers would ordinarily bear a confidential character.'<sup>46</sup> The court found that the obligation of confidence arose both from the nature of the information and from the circumstances in which the defendant obtained the images.<sup>47</sup>

With a prima facie case for breach of confidence, Jackie may be able to obtain an interlocutory injunction pending trial. If successful in establishing breach of confidence, a final injunction to prevent the film from being uploaded to the internet or otherwise published, or a mandatory injunction ordering Lenin to remove any material that had

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<sup>42</sup> As noted in Chapter Three, Part Three (Common Law Action for Invasion of Privacy and Internet Intermediaries), an Internet Content Host (such as YouTube) has no obligation to proactively monitor content posted by others, and cannot be taken to have invaded a person's privacy unless and until they become aware of the nature of the content in question: *BSA* sch 5, cl 91(1). As to what type of awareness is required, refer to the discussion in Chapter Three, Part Three (Common Law Action for Invasion of Privacy and Internet Intermediaries) 107-108.

<sup>43</sup> [2004] VSC 113 (7 April 2004) 62 [149].

<sup>44</sup> *Ibid* [156].

<sup>45</sup> *Ibid* [154]–[158].

<sup>46</sup> *Wilson* [2015] WASC 15 (16 January 2015) [56].

<sup>47</sup> *Ibid* [58].

already been posted to the internet, may be available. If the videos are posted online there is, however, a question as to whether an injunction will be issued requiring removal of that material. If the images can be said to have entered the public domain, even if this is by virtue of Lenin's own actions, an injunction could be considered futile.<sup>48</sup> Nevertheless where, as here, the breach of confidence action involves dignitary or privacy interests — and particularly where it involves intimate images — it may be that the public domain argument, in relation to the granting of an injunction, will not operate to undermine the claim for injunctive relief.<sup>49</sup>

While a final injunction would technically restrain anyone who had downloaded and wished to repost the video to the internet, there are inherent difficulties in enforcing injunctions in the online environment.<sup>50</sup>

There is also an argument that an internet content host that continues to make available content of which it has been notified constitutes a breach of confidence may itself come under an obligation of confidence in respect of the material.<sup>51</sup> To the author's knowledge, this argument has not been tested in Australia. It is clear, however, that an internet content host cannot be liable until such time as it becomes aware of the nature of the content in question.<sup>52</sup>

### *(c) Defamation*

An action in defamation is only complete once publication has occurred, although it is possible that in limited circumstances an interlocutory injunction would be available to prevent the apprehended publication of defamatory material.<sup>53</sup> In order for the video or photographic images to be considered capable of being defamatory, Jackie would need to

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The question of whether publication is so widespread that information has entered the public domain so that an injunction would be futile is essentially a question of fact. Refer to the discussion in Chapter Three, Part Three (Breach of Confidence – Remedies for Breach of Confidence) 120 – 121. See also *Australian Football League v The Age Company Ltd* (2006) 15 VR 419, 428 (Kellam J). Cf *Wilson* [2015] WASC 15 (16 January 2015) [61], Mitchell J: 'Allowing for the fact that third parties may have obtained copies of the images, there is no evidence that the distribution of the images has been so widespread that the grant of injunctive relief would serve no utility at this stage, or that the images have lost their confidential character by reason of the extent of their publication so that the grant of an injunction would not prevent further detriment to the plaintiff'.

Refer to the discussion in Chapter Three, Part Three (Breach of Confidence – Remedies for Breach of Confidence) 120 - 121.

<sup>50</sup> See, eg, Joint Committee on Privacy and Injunctions, UK Parliament, *Report on Privacy and Injunctions* (2012) Chapter Four.

<sup>51</sup> *Doe v Yahoo!7 Pty Ltd* [2013] QDC 181 (9 August 2013); see further Chapter 3, Part Three (Breach of Confidence).

<sup>52</sup> *BSA sch 5*, cl 91(1). See further discussion in Chapter Three, Part Three (Confidential Information and Internet Intermediaries) 122.

<sup>53</sup> See above Chapter Three, Part Three (Defamation) and note in particular page 125 discussing the criteria for the award of an interlocutory injunction as stated in *Jakudo Pty Ltd v South Australian Telecasters Ltd* (Unreported, Supreme Court of South Australia Full Court, Doyle CJ, Williams and Belby JJ, 15 October 1997) 3 (Doyle CJ) referring to judgment of Mason ACJ in *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153.

establish that those images convey a meaning or meanings that would cause an ordinary decent person<sup>54</sup> to think less of her,<sup>55</sup> or to shun or avoid her;<sup>56</sup> or that the meanings conveyed would expose her to hatred, contempt or ridicule.<sup>57</sup> Unless the video is accompanied by words or text (or possibly if the context of publication suggests something defamatory)<sup>58</sup> the only untrue imputation is that she has allowed herself to be filmed semi-naked.<sup>59</sup> This imputation is probably capable of affecting her standing by reference to one of the tests outlined above, although this is certainly not clear-cut because of her relatively young age. By analogy with the case of *Saunders* referred to in Chapter Three, an ordinary decent member of the community may not think less of her, because of her age.<sup>60</sup> Moreover, the exchange of intimate images between partners has been described as a 'not uncommon contemporary practice'.<sup>61</sup>

If the material is found to be defamatory, Lenin could be required to provide an undertaking to Jackie and a final injunction would technically be available to her. Again, however, if the material has been republished elsewhere or downloaded by others, an injunction might be of limited utility. However, an internet content host that is made aware of the defamatory nature of the material might incur direct liability in defamation if it fails to remove the material within a reasonable time.<sup>62</sup>

#### *(d) Intentional or Negligent Infliction of Harm or Harassment*

If Jackie suffers a recognised psychiatric injury or illness as a result of the threats to reveal the video she may also have grounds to sue for intentional or negligent infliction of harm

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<sup>54</sup> *Radio 2UE* (2009) 238 CLR 460, 478 (French CJ, Gummow, Kiefel and Bell JJ), as summarised in *Harbour Radio Pty Ltd v Trad* [2012] HCA 44 ( 5 October 2012), [54].

<sup>55</sup> *Sim v Stretch* [1936] 2 All ER 1237, 1240 (Lord Atkin).

<sup>56</sup> *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, 587 (Slessor LJ); *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449.

<sup>57</sup> *Parmiter v Coupland* (1840) 6 M & W 105, 108 (Parke B); *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449; *Ettingshausen* (1991) 23 NSWLR 443 and see generally Chapter Three, Part Three (Defamation) 122 - 127.

<sup>58</sup> See above Chapter Three, Part Three (Defamation) 124–125 and see, eg, *Shepherd v Walsh* [2001] QSC 358 (6 September 2001) [29] (Jones J) where the context of publication of the photographs (in a 'salacious' magazine) gave rise to the imputation that, inter alia, the plaintiff was a person who 'would expose herself to be photographed for the purpose of the photo being reproduced for reward in a magazine of the kind in question'.

<sup>59</sup> Although the plaintiff in a defamation action does not need to prove the falsity of the imputations communicated truth is a complete defence: see above Chapter Three, Part Three (Defamation) 124–125. Therefore it is likely that Jackie would identify only those imputations that are untrue or at least those in respect of which the truth of which would be difficult to establish.

<sup>60</sup> *Saunders v Nationwide News Pty Ltd* [2005] NSWCA 404 [13] (Hunt AJA): his Honour was of the opinion that it was open to the jury to conclude that an ordinary decent member of the community would not think less of a seven year old child engaged in petrol sniffing, due to his immaturity. However, he went on to comment that, in his view, '[a] child of seven years old is, perhaps, somewhere near the borderline'.

<sup>61</sup> *Wilson* [2015] WASC 15, [81].

<sup>62</sup> See Chapter Three, Part Three (Liability in Defamation of Internet Intermediaries) 126–127.

or harassment.<sup>63</sup> For the purposes of an action for intentional infliction of harm or harassment, the requisite intention on the part of Lenin is likely to be fairly easy to establish because he is using the threat of disclosure to coerce Jackie for his own ends. For the purpose of an action for negligent infliction of harm, a threshold issue will be the foreseeability of pure mental harm on the part of a person of normal fortitude.<sup>64</sup> Foreseeability in this respect will likely be readily established in a situation such as this, where Lenin is using threats to coerce Jackie into doing something she does not wish to do. Jackie's young age and Lenin's relative maturity will also be relevant factors in determining the foreseeability of harm.<sup>65</sup>

#### *(e) Information Privacy Legislation*

The *Privacy Act* does not apply to the acts or practices of individuals<sup>66</sup> and will not, therefore, apply to Lenin.

If the video is uploaded to YouTube then there is a preliminary question as to whether the *Privacy Act* applies to that service. This is certainly not straightforward.<sup>67</sup> If the *Privacy Act*

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<sup>63</sup> Where Jackie suffers distress, humiliation or embarrassment short of a recognised psychiatric injury or illness this will not be sufficient to found an action: see above Chapter Three, Part Three (Intentional infliction of Harm and Negligent Infliction of Harm) 132-136.

<sup>64</sup> In six jurisdictions foreseeability that mental harm might, in the circumstances, be suffered by a person of normal fortitude is a threshold issue in establishing the duty of care: see *Civil Liability Act 2002* (WA) s 5S(1). Similar provisions are contained within *Civil Law (Wrongs) Act 2002* (ACT) s 34(1); *Civil Liability Act 2002* (NSW) s 32(1); *Civil Liability Act 1936* (SA) s 33; *Civil Liability Act 2002* (Tas) s34(1). In the remaining jurisdictions, foreseeability of pure mental harm on the part of a person of normal fortitude is relevant to establishing duty or breach of duty: in *Tame v New South Wales* (2002) 211 CLR 317, 380 [189] Gummow and Kirby JJ (380 [189]) described the normal fortitude test as going to the issue of foreseeability for the purposes of establishing breach of duty, but Gleeson CJ (332-3 [16]), Gaudron J (339 [45]), McHugh J (346 [71]) and Hayne J (410 [273]) referred to the 'normal fortitude' rule as a control mechanism relevant to a determination of whether or not there existed a duty of care.

<sup>65</sup> Note also, in the six jurisdictions specifying a 'normal fortitude test' for mental harm, or pure mental harm, a relevant consideration in establishing what the defendant ought to have foreseen will be the existence of a pre-existing relationship between the defendant and the plaintiff: *Civil Law (Wrongs) Act 2002* (ACT) s 34(2); *Civil Liability Act 2002* (NSW) s 32(2); *Civil Liability Act 1936* (SA) s 33(2) *Civil Liability Act 2002* (Tas) s 34(2); *Wrongs Act 1958* (Vic) s 72(2); *Civil Liability Act 2002* (WA) s 5S(1).

<sup>66</sup> *Privacy Act* s 7B(1).

<sup>67</sup> It would appear that YouTube's servers are all located outside of Australia - see below n 98. Although Google has an Australian company — Google Pty Ltd — this company is a wholly owned subsidiary of Google International LLC, the ultimate holding company being Google Inc: *Rana v Google Australia Pty Ltd* [2013] FCA 60 (7 February 2013) [35] ('*Rana*'). In *Rana* the Federal Court of Australia considered (at [36]) whether Google Australia Pty Ltd was a publisher of allegedly defamatory matter contained in websites hosted by Google. Mansfield J referred to and accepted the evidence of Google Australia's solicitor that Google Inc, situated in the USA, owns and operates the business that supplies the Google Web Search and Google Images products and that Google Inc offers the 'products' on its websites to the public pursuant to written terms of service stating that the services are provided by Google Inc. In relation to YouTube, therefore, it is likely, therefore, that the site is operated by Google Inc rather than Google Australia Pty Ltd. As such, to determine whether the *Privacy Act* applies in respect of personal information uploaded to the site, a threshold question will be whether the personal information can be said to be collected in Australia or about Australians for the purpose of the application of the extraterritorial provisions of the Act. In 2010 the then Australian Privacy Commissioner obtained undertakings from Google in relation to its inadvertent collection of wifi data by Google Street View Vehicles. The Privacy Commissioner stated that she was

does apply to YouTube (or, rather, its parent Google) then that organisation will need to comply with the APPs in relation to its collection of personal information.<sup>68</sup> Where personal information is held in a 'record', that personal information must also be used and stored in accordance with the APPs.<sup>69</sup>

Whether the video of Jackie constitutes personal information within the meaning of the *Privacy Act* depends on whether Jackie is identified in the video, or reasonably identifiable in it.<sup>70</sup> If captions or titles are applied to the video that name Jackie, then she has been identified and the video will probably be considered personal information within the meaning of the Act. Even if the video is not associated with Jackie's name, however, it is possible that the video will be considered personal information if a large enough section of members of the public with access to the video could identify her from it.<sup>71</sup>

If YouTube is bound by the *Privacy Act* and the video of Jackie is personal information, the uploading of a video onto YouTube will need to be considered by reference to APP 3 (personal information that is collected by solicitation) or APP 4 (personal information that is received by an organisation, but not solicited).<sup>72</sup> In either case, to comply with those APPs the collection or receipt of personal information (video images) must be reasonably

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satisfied that, on the information available, 'any collection of personal information would have breached the Australian *Privacy Act*': OAIC, *Australian Privacy Commissioner Obtains Undertakings from Google* (9 July 2010) <<https://www.oaic.gov.au/media-and-speeches/statements/google-street-view-wi-fi-collection#australian-privacy-commissioner-obtains-privacy-undertakings-from-google>>. However, the personal information collected by Google StreetView was collected *directly* by Google vehicles, in Australia. Where information is not collected in Australia, the circumstances in which the *Privacy Act* will have extraterritorial application are not entirely clear. See also Chapter 3, Part Three (Information Privacy Laws) and see, also, Anna Bunn, 'Facebook and Face Recognition: Kinda Cool, Kinda Creepy' (2014) 25(1) *Bond Law Review* 35. Nevertheless the OAIC has expressed the view that any personal information uploaded from a computer located in Australia is information that is collected in Australia, albeit that it is never stored on a server within Australia: Telephone Conversation with Carl, OAIC Enquiry Officer (2 September 2015).

<sup>68</sup> *Privacy Act* s 6(1) (definition of 'collect') and see Chapter Three, Part Three (Information Privacy Laws) 148 - 149.

<sup>69</sup> An entity 'holds' information only if the entity has in its possession or control a record containing the personal information: *ibid* (definition of 'holds').

<sup>70</sup> *Ibid* (definition of 'personal information').

<sup>71</sup> Although Jackie may be identifiable by those who know her (depending on what the video actually reveals and how clear it is) this does not mean that she is 'reasonably identifiable' to the organisation collecting or holding the video. For a discussion on the meaning of when an individual is considered 'identified or reasonably identifiable' see ALRC, *For Your Information*, above n 9, Vol 1, 300-6 [6.27]-[6.47]. In its guidelines on the Australian Privacy Principles, the OAIC notes that whether an individual is reasonably identifiable from particular information will depend on all the circumstances including, 'if the information is publically released, whether a reasonable member of the public who accesses that information would be able to identify the individual': OAIC, *Australian Privacy Principles Guidelines*, 31 March 2015, 20 [B.91]. However, the OAIC has also stated that it believes this may not be the case unless the section of the public able to identify the person is sufficiently broad and that, for example, a photograph of someone's house is not personal information just because neighbours, family and friends are able to associate the house with a particular individual as this group is not sufficiently broad: Telephone Conversation with Carl, OAIC Enquiry Officer (2 September 2015).

<sup>72</sup> For a discussion as to whether information posted by a Facebook user can be considered to have been solicited by Facebook or not, see: Bunn, above n 67.

necessary for one or more of the organisation's functions or purposes.<sup>73</sup> Given that the video content actually breaches YouTube's own terms and community guidelines,<sup>74</sup> it is clearly not reasonably necessary for one or more of the organisation's functions or purposes. A failure by YouTube to delete the video of Jackie could therefore be a breach of APPs. Complaining to the OAIC about a breach would, however, only be necessary if YouTube had itself already been notified of the video's existence, and had refused to delete it.<sup>75</sup> Given that, as noted above, the content is a clear breach of YouTube's own terms of service, it is likely that the video would be removed by the service upon receipt of a complaint.

Jackie will have no standing to bring an action for breach of the *Privacy Act* directly.<sup>76</sup>

#### *(f) Enhancing Online Safety for Children Legislation*

If Lenin proceeds to post videos of Jackie to YouTube, these would likely be classed as 'cyberbullying material targeted at an Australian Child' under the *Online Safety Act*.<sup>77</sup> YouTube is currently listed as a Tier 2 social media service under the Act's tier scheme. Therefore Jackie may lodge a complaint with the e-Safety Commissioner in the event that material is not removed from the site within 48 hours of a request being made by Jackie.<sup>78</sup> Upon receipt of a complaint,<sup>79</sup> the e-Safety Commissioner could issue a social media service notice requiring the removal of the material from YouTube.<sup>80</sup> Upon receipt of such notice, YouTube would then be required to remove the videos within 48 hours or face consequences under the Act, which can include penalties, enforceable undertakings and injunctions.<sup>81</sup> Even if the videos are not actually posted to YouTube, Jackie may be able to

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<sup>73</sup> *Privacy Act* sch 3, APPs 3, 4. The Explanatory Memorandum to Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth), page 53 explains that whether collection is reasonably necessary is to be 'interpreted objectively and in a practical sense.'

<sup>74</sup> YouTube, *Terms of Service* (9 June 2010) <<http://www.youtube.com/t/terms>> term 6E; YouTube, *Community Guidelines* <<https://www.youtube.com/yt/policyandsafety/communityguidelines.html>> (Don't Cross the Line); see also Chapter Three, Part Three (Regulation of Content under the *Broadcasting Service Act 1992* (Cth)) 153 - 155.

<sup>75</sup> The OAIC advises that complaints generally need to be lodged directly with the entity in question, which should be allowed 30 days to respond. Where a response is not received in that time, or the complainant does not regard the response as satisfactory, then the complaint can be addressed to the OAIC: OAIC, *How do I Make a Privacy Complaint?* <<http://oaic.gov.au/privacy/making-a-privacy-complaint>>.

<sup>76</sup> *Austen v Civil Aviation Authority* (1994) 50 FCR 272, 278.

<sup>77</sup> *Online Safety Act* s 5: 'cyberbullying material targeted at an Australian child' is defined as material that satisfies various conditions including that it 'would be likely to have the effect on the Australian child of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating' the Australian child. The video identifying Jackie is likely to be considered 'seriously humiliating'.

<sup>78</sup> *Ibid* s 18.

<sup>79</sup> Made pursuant to the *Online Safety Act* s 18.

<sup>80</sup> *Ibid* s 35. The Commissioner must be satisfied that the material is 'cyberbullying material targeted at an Australian child' and that the other conditions specified in s 35 (such as prior lodgement of a complaint with the social media service under its complaints scheme) are met.

<sup>81</sup> *Ibid* ss 36 and 46 (civil penalty provisions); s 47 (enforceable undertakings); s 48 (injunctions).

lodge a complaint with the e-Safety Commissioner on the basis of material that has been or is being provided on a relevant electronic service, namely Skype.<sup>82</sup>

If Lenin does post the material to YouTube and Jackie lodges a complaint with the e-Safety Commissioner,<sup>83</sup> the e-Safety Commissioner has power to issue an end-user notice to Lenin.<sup>84</sup> That notice can require Lenin to take all reasonable steps to ensure the removal of the material from YouTube within a specified period, to refrain from posting further such material and to apologise to Jackie.<sup>85</sup> Even if the videos are not posted to YouTube, Jackie would be able to lodge a complaint with the e-Safety Commissioner on the basis that the material has been provided on a social media or relevant electronic service (Skype).<sup>86</sup> However, the e-Safety Commissioner cannot issue an end-user notice unless and until Lenin posts the videos on a relevant service.<sup>87</sup>

*(g) Contract/Internet Content Regulation/Industry Regulation*

The YouTube terms and conditions are stated to apply to all those who use the site.<sup>88</sup> The YouTube terms and conditions incorporate its privacy policy, as well as its community guidelines<sup>89</sup> and state that users are not to upload content that is contrary to the community guidelines.<sup>90</sup> Those community guidelines state, among other things, that:

Things like predatory behavior, stalking, threats, harassment, intimidation, invading privacy, revealing other people's personal information, and inciting others to commit violent acts or to violate the Terms of Use are taken very seriously. Anyone caught doing these things may be permanently banned from YouTube.<sup>91</sup>

The YouTube community guidelines state that YouTube works closely with law enforcement and that they report child exploitation.<sup>92</sup> However, the terms of service do not *oblige* YouTube to remove content that amounts to an invasion of privacy or

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<sup>82</sup> Material is 'provided' on a social media service or relevant electronic service if it is accessible or delivered to one or more end-users using the service: Ibid s 6. 'Material' includes material in the form of text, data, speech, music, sounds, visual images or material in any other form: *Online Safety Act* s4. Given that the images of Jackie (which constitute 'material' under the Act: at s 4) were accessible to Lenin, arguably they have been provided to an end-user within the meaning of the Act. The question, then, is whether Skype constitutes a 'social media service' or 'relevant electronic service' under the Act. Arguably, Skype would constitute a social media service within the meaning of the Act ('social media service' is defined in the *Online Safety Act* s 9) but will in any event, constitute a 'relevant electronic service': at s 4, whereby a relevant electronic service includes a 'chat service that enables end-users to communicate with other end-users.'

<sup>83</sup> Ibid s 18.

<sup>84</sup> Ibid s 42.

<sup>85</sup> Ibid

<sup>86</sup> Ibid s 18.

<sup>87</sup> Ibid s 42.

<sup>88</sup> YouTube, *Terms of Service* (9 June 2010) <<http://www.youtube.com/t/terms>> term 1A.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid term 6E.

<sup>91</sup> YouTube, *Community Guidelines* <[http://www.youtube.com/t/community\\_guidelines?hl=en-GB&gl=AU](http://www.youtube.com/t/community_guidelines?hl=en-GB&gl=AU)> (Threats).

<sup>92</sup> Ibid (Nudity or Sexual Content).



otherwise contravenes the community guidelines or the terms in general. Rather, YouTube has discretion to remove the content. Accordingly, if the video of Jackie is posted to YouTube Jackie can notify the site host and request that they remove the video.<sup>93</sup> Although this request will not place YouTube under a contractually enforceable obligation vis-a-vis Jackie, it is likely that the site host would comply: the video clearly involves the revelation of personal information and probably amounts to child exploitation (although the meaning of this term is not defined in the YouTube terms).

Jackie does not need to use the YouTube service or have any contract with YouTube in order to report the images nor to request their removal.<sup>94</sup>

Should the video of Jackie or still images from it be uploaded to another social networking site, similar procedures as discussed above would ordinarily allow Jackie to make a request to the site host to remove the content. Generally, site hosts will have terms of service prohibiting this type of material and will have the ability, but not the obligation, to remove material contrary to its terms. In this case, the nature of the material is such that it will almost certainly be removed by reputable sites.<sup>95</sup>

The video and photographs of Jackie would be 'prohibited' or 'potentially prohibited' based on criteria outlined in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), the National Classification Code and the Guidelines for the Classification of Films and Computer Games 2005.<sup>96</sup> However, the e-Safety Commissioner can only issue a take-down notice if the content is hosted in or provided from Australia<sup>97</sup> and as the majority of YouTube content is hosted outside of Australia,<sup>98</sup> a take-down notice will not be issued. However, the e-Safety Commissioner can refer the content to the suppliers of approved internet filters in accordance with the Internet Industry Association Code of

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<sup>93</sup> The procedure for reporting an inappropriate video using the 'flagging procedure' requires a user to be logged into their Google account: YouTube, *Flag Inappropriate Content*, YouTube Help <<https://support.google.com/youtube/answer/2802027?hl=en>>.

<sup>94</sup> Nevertheless to use the 'flagging content' procedure, whereby users can flag content on a number of grounds, including that it is offensive or an invasion of their privacy, an individual must have a Google account and be logged in: see *ibid*.

<sup>95</sup> Although of course there are websites and platforms that host user-generated content that are not reputable: for example, websites that encourage people to post intimate images of others (often current or former partners) without the image subject's consent — so-called 'revenge porn websites': see, eg, Ronald Chavez, 'Google to Remove Revenge Porn Sites from Search', *Mashable Australia*, 20 June 2015 <<http://mashable.com/2015/06/19/google-remove-revenge-porn-sites/#Z0OLGmFbliq4>>.

<sup>96</sup> See ACMA, *Regulating Online Content* <<http://www.acma.gov.au/Industry/Internet/Internet-content/Internet-content-complaints/regulating-online-content>> and see Chapter Three, Part Three (Regulation of Content under the *Broadcasting Services Act 1992* (Cth)) 153.

<sup>97</sup> *BSA* sch 7, s 47 and (in relation to a cessation notice, s 56).

<sup>98</sup> YouTube is a wholly owned subsidiary of Google International LLC, the ultimate holding company being Google Inc: *Rana* [2013] FCA 60 (7 February 2013) [35]. An article in Britain's Daily Mail suggests that all the Google servers are located in various locations in the US and Scandinavia: Mark Prigg, 'Inside the Internet: Google allows first ever look at the eight vast data centres that power the online world', *Mail Online*, 17 October 2012 <<http://www.dailymail.co.uk/sciencetech/article-2219188/Inside-Google-pictures-gives-look-8-vast-data-centres.html>>.

Practice and in relation to serious content, such as child pornography, may also notify a law enforcement agency.<sup>99</sup>

#### *(h) Criminal Offences*

Lenin will have committed a number of criminal offences. First of all, the fact that both Jackie and Lenin are resident in Western Australia and that Lenin recorded Jackie while the two were involved in a private activity (the activity being their exchanges via Skype) and without her consent means that Lenin will have committed a breach of the *Surveillance Devices Act 1998* (WA) ('SDA').<sup>100</sup> If any of the video recordings, or still images taken from them, are sent to others or uploaded to the internet, Lenin might also be in breach of other provisions of the SDA, which prohibit the publication of private activities recorded by use of a surveillance device.<sup>101</sup> The penalty that can be applied to Lenin for breach of each section of the SDA is a fine of \$5,000, imprisonment for 12 months or both.<sup>102</sup> Breach of the SDA will not, however, give Jackie a private law right of action and, importantly, does not mean that she will be able to use the breach as the basis for applying for an injunction to prevent the publication of the images by Lenin.<sup>103</sup>

Because Jackie is a child under 16, the capture and distribution or threatened distribution of the naked images of her, as well as the encouragement of her to reveal her body over Skype to Lenin, will constitute a number of offences under the child exploitation provisions of the *Criminal Code Compilation Act 1913* (WA) ('*Criminal Code*'), with the possibility of heavy penalty.<sup>104</sup> Lenin's action will also constitute a stalking offence under the *Criminal Code*<sup>105</sup> and will amount to an offence under the federal Criminal Code.<sup>106</sup>

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<sup>99</sup> ACMA, *Regulating Online Content*, above n 96.

<sup>100</sup> SDA s 6 prohibits, among other things, the use of an optical surveillance device to 'record visually a private activity to which that person is a party', without the express or implied consent of each principal party to the private activity. An optical surveillance device is defined as 'any instrument, apparatus, equipment or other device capable of being used to record visually or observe a private activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment': s 3. A private activity is defined as 'any activity carried on in circumstances that may reasonably be taken to indicate that any of the parties to the activity desires it to be observed only by themselves, but does not include an activity carried on in any circumstances in which the parties to the activity ought reasonably to expect that the activity may be observed': s 3. However, note that if Lenin was located outside of Western Australia the position might be different, as different jurisdictions have different surveillance laws and not all prohibit the use of an optical surveillance device to monitor and record private activity: see, further, Chapter Three, Part Three (Criminal Law) 155.

<sup>101</sup> SDA s 9.

<sup>102</sup> Ibid ss 6, 9.

<sup>103</sup> *Pillay T/As West Corp Mortgage Market v Nine Network Australia Pty Limited* [2002] NSWSC 983 (15 October 2002) [19]. Also, as noted above, an injunction will be available on other grounds.

<sup>104</sup> Chapter XXV (Child Exploitation Material).

<sup>105</sup> Ibid s 338E.

<sup>106</sup> See, eg, *Criminal Code Act 1995* (Cth), s 474-17 (Using a carriage service to menace, harass or cause offence).

*(i) Summary of Legal Position for Case Study One*

In summary, Jackie has a number of possible options she could pursue in order to obtain redress.

Given that Lenin has threatened to publish images of her, Jackie would likely be able to obtain an interlocutory injunction to prevent publication on the basis of a demonstrable cause of action for breach of confidence. If the images are published, a breach of confidence action would nevertheless lie against Lenin, and it is likely that an injunction would be ordered for removal of any images that have been published. Jackie may also have an action against Lenin for intentional infliction of harm. If an action for invasion of privacy is recognised, the capture and publication of the images would almost certainly satisfy the elements of the action.

If Lenin posts the images to YouTube, Jackie's best solution would be to notify YouTube directly.<sup>107</sup> Given her age and the nature of the images it is very likely that YouTube would remove the images. If Lenin were to post the images on another site, however, this option may not be available.<sup>108</sup> It seems unlikely that any publication of the images by an internet host would be a matter that the OAIC would investigate, for the reasons set out above. However, if any content host fails to remove images within a reasonable time of being notified of their existence, a complaint can be made to the e-Safety Commissioner. If Lenin actually uploads the images to a social media service such as YouTube, or a relevant electronic service, the e-Safety Commissioner may issue an end-user notice to Lenin requiring the materials to be removed, among other things.

Once publication on the internet has occurred, however, the ability to remove the images from the internet altogether is largely dependent on them not having been copied (or downloaded and 'reposted') by others — in this respect, time is of the essence.

In addition to pursuing a cause of action for breach of confidence or intentional infliction of harm, or reporting the content to the service hosting it or to the e-Safety Commissioner, a report of Lenin's threats or any actual publication of the images can be made to the police. As discussed above, Lenin's actions likely constitute a number of criminal offences.

Of course, the availability of legal remedies does not mean that Jackie would or could easily avail herself of them. A number of practical barriers face children and young people

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<sup>107</sup> Videos can be reported directly by using the reporting functionality in the site — for an explanation of how content can be reported, see YouTube, *Reporting and Enforcement Center*, <<https://www.youtube.com/yt/policyandsafety/reporting.html>>.

<sup>108</sup> This may be because Jackie is not aware of where the images have been posted, or it may be because the site host is not 'reputable' and may fail to respond to requests to remove material of this nature. Although where the site is hosted in Australia the Children's e-Safety Commissioner can issue a take-down notice in respect of any images of this nature that are drawn to their attention: *BSA sch 7, s 47*. See further Chapter Three, Part Three (Regulation of Content under the *Broadcasting Services Act 1992* (Cth)) 153 - 154.

wishing to take legal action: these may include lack of awareness of a remedy;<sup>109</sup> lack of awareness as to how to pursue a remedy; and access to justice issues, such as cost. It is also the case that young people may not consider legal action as an option quite apart from any practical difficulties; this could be for a number of reasons including embarrassment and fear of further publicity, or fear of the consequences, such as a concern that they may be ‘banned’ from access to technology or social media.<sup>110</sup>

## B Case Study Two (Tim)

### 1 Scenario

Tim is an overweight 15 year old boy. One day after school he visits a local park with some friends. The group of friends play a brief game of football and Tim removes his shirt, as it is a hot day and he is feeling uncomfortable. Before Tim realises what is happening, another member of the group, Kieren, takes a photograph of Tim on his mobile phone. The photograph is later posted on Kieren’s Facebook page. Tim is Facebook ‘friends’ with Kieren and finds out about the photograph, as he is tagged in it.<sup>111</sup> Kieren has applied ‘public’ settings to his Facebook account, so access to Kieren’s site, including all of the photographs he posts, is unrestricted and available to anyone.<sup>112</sup> When he sees the picture Tim feels very upset: he is already very embarrassed about his weight and distraught that his photograph was taken at all, let alone now viewable by a wide audience, including both people he knows as well as complete strangers. Tim is also fearful that this photograph will forever be linked to him whenever anyone searches against his name.

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<sup>109</sup> Ilan Katz et al, *Research on Youth Exposure to, and Management of, Cyberbullying Incidents in Australia*, Synthesis Report: Prepared for Australian Government Department of Communications, June 2014, 7.

<sup>110</sup> See, eg, Australian Institute of Criminology, *Covert and Cyberbullying*, Research in Practice, Tipsheet No 09 2010; KidsHelpline, *Cyberbullying* < <http://www.kidshelpline.com.au/grownups/news-research/hot-topics/cyber-bullying.php>>; Tesco Mobile and National Children’s Homes, *Putting U in the Picture – Mobile Bullying Survey 2005*, 2005, 1.

<sup>111</sup> Tagging is name given to the practice whereby Facebook users who upload photographs are able to add the name of individuals appearing in the photograph, where those individuals are also Facebook users — the addition of a tag links the image to the account of the person tagged in it: Facebook, Help Centre, *What is Tagging and How Does It Work?* < <https://www.facebook.com/help/124970597582337>>. However, it is also possible to add to photographs the names of people who are not Facebook users. A person who is tagged may or may not be a Facebook user. Where a Facebook user is tagged in a photograph, they will be notified that they have been tagged and will have the option of removing the tag, but not the photograph: Facebook, Help Centre, *How Do I Remove a Tag from a Photo or Post I’m Tagged In?* <https://www.facebook.com/help/140906109319589>.

<sup>112</sup> Facebook allows users to control the audience for their page, or aspects of it, through the user’s privacy settings. If a user has their account settings set to ‘public’ then the information subject to that setting is available to (and searchable by) anyone on the internet: see, eg, Facebook, *Privacy*, <http://www.facebook.com/help/445588775451827>.

## 2 Background and Key Features

The scenario presented in this case study is a hypothetical scenario, but based on a photograph available on a public website.<sup>113</sup>

The case study bears some similarities to reports of a real-life scenario. Paulson, in an article on internet bullying, refers to reports of covert photographs taken of an overweight Japanese schoolboy in the locker room being distributed to many of his peers.<sup>114</sup> A key difference between that scenario and the one of this case study, however, is that the Japanese schoolboy was not aware of his photograph being taken whereas in this situation Tim was aware. Other key features of this scenario are that while Tim was aware of the photograph being taken, he did not pose for it and cannot be said to have expressly consented to it being taken. Neither has Tim expressly consented to the photograph being published online. Kieren's purpose in taking and posting the photograph of Tim is not clear from the facts of the case study.

## 3 Discussion of Law

### (a) Action for Invasion of Privacy

Even if a common law cause of action for invasion of privacy is developed, Tim will face considerable challenges demonstrating that he had a reasonable expectation of privacy in relation to the publication of the photograph. One reason for this is that the photograph was taken in a public place and reveals only information (how Tim looks without his shirt on) that Tim had been prepared to 'communicate' to those present. If Australian courts were to be guided by the approach of the ALRC to determining the reasonable expectation of privacy in a public place, Tim would be unlikely to succeed. Although the ALRC recognises that a person may have an expectation of privacy in relation to the publication or information captured in a public place,<sup>115</sup> all of the examples given by the ALRC of disclosures that would constitute an invasion of privacy within the scope of the proposed cause of action relate to information that is *inherently* private or to images that capture the plaintiff in an intimate or embarrassing moment.<sup>116</sup> In Tim's case it is difficult to say that the 'information' itself is inherently private, unless perhaps the court is convinced by

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<sup>113</sup> The image will appear in Google images if a search is conducted for 'fat kids'. The image is one of several photographs of obese children, most of which clearly show the features of the children such that they would be recognisable by friends and acquaintances. The picture has been posted and re-posted numerous times on the Internet, with the added caption: 'Making women into lesbians, one Big Mac at a time'. See, eg, <http://www.thebuzzmedia.com/wp-content/uploads/2008/11/motivational-poster-mcdonalds-fat-kid-flubber.jpg>. The original photographer is not known to the author, neither is the identity of the boy depicted.

<sup>114</sup> Amanda Paulson, 'Internet Bullying' *Christian Science Monitor* (30 December 2003) <<http://www.csmonitor.com/2003/1230/p11s01-legn.html>>.

<sup>115</sup> ALRC, *Serious Invasions of Privacy*, above n 10, 101 [6.50]. This is a clear reference to situation such as that occurring in *Peck* [2003] I Eur Court HR 123 where the plaintiff was captured on CCTV in the aftermath of an attempt on his own life, at 143.

<sup>116</sup> *Ibid* 85–87 [5.56]–[5.66], 116 [7.36].

an argument that the photograph communicates information about Tim's health and should be considered private on that basis.<sup>117</sup> This is also not a situation in which a person in a public place has been caught in a humiliating or traumatic situation,<sup>118</sup> although the image might be considered embarrassing, and neither has there been any intrusion into a private space. , However, Australian courts have shown some preparedness to recognise that a person may have a reasonable expectation of privacy vis-a-vis the publication of information that is neither inherently private, nor intimate or embarrassing. In the case of *Saad*, for example, the court suggested that it was arguable that a reasonable expectation of privacy could, in some circumstances, attach to images captured by CCTV, where the information conveyed by those images was not inherently private. This was on the basis that the images were obtained for a limited purpose (security) and in circumstances where the person captured in the image had no choice about their image being captured.<sup>119</sup> Also, and as discussed in Chapter Three, in *Lenah*, Gleeson CJ suggested that 'the requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities' is often a useful practical

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<sup>117</sup> Obesity is a recognised health issue and it has been suggested that information about health may be easily identified as private: *Lenah* (2001) 208 CLR 199, 226 [42] (Gleeson CJ). On the other hand, the photograph communicates no more than was observable to those present and communicates no specific medical facts about Tim other than those observable. This situation can be contrasted Naomi Campbell who was successful in establishing a reasonable expectation of privacy (in the context of a breach of confidence action) in relation to images of herself in a public place. A key difference between the facts of *Campbell* and the facts of this case study is that in the former the publication of the photographs with the accompanying text revealed sensitive health information beyond that which would have been available to anyone simply observing Naomi Campbell on the street — this is because the photographs and the text were linked: *Campbell* [2004] 2 All ER 995, 1028 [121]. Lord Hope commented that: 'The words: "Therapy: Naomi outside meeting" underneath the photograph on the front page and the words "Hugs: Naomi dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week" underneath the photograph on p13 were designed to link *what might otherwise have been anonymous and uninformative pictures* with the main text': *Campbell* [2004] 2 All ER 995, 1028 [121]. In Tim's case, however, the photograph reveals no more than would have been observable by those in Tim's vicinity at the time he removed his shirt.

<sup>118</sup> Tim's position can be contrasted with the example given by the ALRC referring to one US case in which a woman succeeded in an invasion of privacy action in respect of a photograph taken at the moment her dress was blown up by a jet of air: ALRC, *Serious Invasions of Privacy*, above n39, 100 [6.44]. It can also be contrasted with the position of the successful claimant in *Peck* [2003] 1 Eur Court HR 123 who had been captured on CCTV camera holding a knife in the moments before and after a suicide attempt. In *Campbell*, having cited *Peck* with approval, Lord Hoffman opined that 'the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of privacy': *Campbell* [2004] 2 All ER 995, 1015 [75]. However, Moreham has commented that 'it is important to distinguish between humiliating and embarrassing situations which the claimant has created him or herself and those which have been forced upon him or her against his or her wishes': Nicole Moreham, 'Privacy in Public Places' (2006) 65(3) *Cambridge Law Journal* 606, 625.

<sup>119</sup> *Saad* [2012] NSWSC 1183 (4 October 2012) [168 (v)] (Hall J). See, also, Nicole Moreham 'Privacy in Public Places' (2006) 65(3) *Cambridge Law Journal* 606, who argues that various factors should be taken into account in determining whether a claimant has a reasonable expectation of privacy in a public place, including the nature of the location and audience, the nature of the claimant's activity (including whether the claimant was engaged in a humiliating, intimate or traumatic moment and whether the claimant drew attention to him/herself), and the way in which the image was obtained.

test of whether information is private.<sup>120</sup> It could be argued that disclosure of the photograph is highly offensive, when judged from the perspective of a person of ordinary sensibilities in Tim's position. However, an added difficulty for Tim here is that any particular sensitivity on his part will be irrelevant in assessing whether publication would be regarded as highly offensive.

It is also possible that courts would take into account Tim's age in determining that he had a reasonable expectation of privacy in a situation such as this, even if an adult in the same position might not have. As to the question of whether children have an expectation of privacy in situations that an adult would not have, Australian courts might look to the approach taken in other jurisdictions. In this regard, it is interesting to note recent developments in the cause of action for invasion of privacy in England and Wales. In the recent decision of the Court of Appeal of England and Wales in *Weller*,<sup>121</sup> the court held that children of a celebrity parent who were photographed on the street during a public outing, photographs that were subsequently published in a magazine, had a reasonable expectation of privacy in relation to the publication of those photographs. In reaching that conclusion, the Master of the Rolls, with whose judgment the other members of the court concurred, held that the expectation of privacy arose due to a number of factors. One such factor was that the children were engaged in a family outing.<sup>122</sup> However, the 'critical factor' supporting the finding that the children had a reasonable expectation of privacy was, in the court's view, the fact that the claimants were children and had been identified by their surname.<sup>123</sup> One reason this was important was because, in the view of the court, '[c]hildren should be protected from the risk of embarrassment and bullying and potentially more serious threats to their safety.'<sup>124</sup> This suggests that in certain circumstances children may indeed be found to have an expectation of privacy when an

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<sup>120</sup> *Lenah* (2001) 208 CLR 199, 226 [42]. Referring to the paragraph of Gleeson CJ's judgment in *Lenah* from which the quote is taken, Lord Hope in *Campbell* stated that it was important to bear in mind the source of the offensiveness test 'and the guidance which the source offers as to whether the information is public or private': *Campbell* [2004] 2 All ER 995, 1020 [94]. Lord Hope then referred to the relevant source, being the *US Restatement of the Law of Torts (Second) 1977* §652D and observed that the reference to the person of ordinary sensibilities was, as acknowledged by Gleeson CJ, a quotation from Dean Prosser who stated that 'the matter made public must be one which would be offensive and objectionable to a reasonable man, who must expect some reporting of his daily activities': *Campbell* [2004] 2 All ER 995, 1020 [94] (references omitted).

<sup>121</sup> *Weller* [2015] EWCA Civ 1176, [36] (Lord Dyson, Master of the Rolls, with Lords Justice Tomlinson and Bean in agreement).

<sup>122</sup> *Ibid* [61] (Lord Dyson, Master of the Rolls, with Lords Justice Tomlinson and Bean in agreement): 't]he essential point is that it was a family activity which belongs to that part of life which is protected by the broader right of personal autonomy recognised in the case law of the Strasbourg court ... The family element of the activity distinguishes it from Naomi Campbell's popping out to the shops for a bottle of milk and Sir Elton John standing with his driver in a London street, outside the gate to his home wearing a baseball cap and tracksuit ...'

<sup>123</sup> *Ibid* [63] (Lord Dyson, Master of the Rolls, with Lords Justice Tomlinson and Bean in agreement).

<sup>124</sup> *Ibid* [64] (Lord Dyson, Master of the Rolls, with Lords Justice Tomlinson and Bean in agreement).

adult might not.<sup>125</sup> In the Australian context, the ALRC's recommendations for the form of a statutory cause of action for serious invasions of privacy set out a number of non-exhaustive factors to be taken into account in determining whether a plaintiff has a reasonable expectation of privacy. These include the attributes of the plaintiff, including the plaintiff's age.

It is possible that Australian courts in developing a common law cause of action for invasion of privacy, guided by the ALRC recommendations referred to above and the decision of UK courts relating to the interests of children, would likewise be prepared to find that a child has a reasonable expectation of privacy in situations where an adult might not do so. This could include, for example, situations where an image (not otherwise depicting a 'clearly private' moment) is, as here, taken in a public place.

Even if Tim is able to establish a reasonable expectation of privacy, for the purpose of a common law action, however, his chances of success are further curtailed by issues of consent, seriousness, intention and countervailing interests in freedom of expression.

Consent may operate as a defence to any action for invasion of privacy or affect the determination of whether a person had a reasonable expectation of privacy in relation to the capture or publication of information.<sup>126</sup> It is possible to argue that the fact Tim removed his shirt in a public place, in the knowledge that any number of individuals would have had the ability to photograph him on their digital devices, was sufficient to imply his consent to the photograph being taken and subsequently published (such as on a social media platform). There is, however, a countervailing argument that consent to being photographed does not, or should not, imply consent to its publication.<sup>127</sup>

It is unclear whether an action for invasion of privacy would be made out only where the invasion concerned is serious, and if so how high the 'bar would be set' — so whether, for example, the invasion would need to be 'highly offensive' or meet some other

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<sup>125</sup> However, it is also possible that the opposite is true and that in some circumstances, adults, or older children, may be found to have an expectation of privacy when a younger child would not. This is because, in the court's view, relevant factors in determining whether or not there is an expectation of privacy is the impact of publication on the image subject, as well as the attributes of the claimant including their age. To this end, the court noted that '[a]n older child is likely to have a greater perception of his own privacy and his experience of an interference with it might well be more significant than for a younger child': Ibid [31] (Lord Dyson, Master of the Rolls). It is also important to bear in mind that *Weller* involved the publication of photographs of children involved in a private activity (a family outing) in a media context — this context was important in striking a balance between the competing interests involved but may also have been relevant to determining that the child had a reasonable expectation of privacy: had photographs of the children been published in a different context, for example, by a member of the public who happened to have come across the children on the street, took a photograph and posted it to a social media site, it is possible the court would have found that the children had no expectation of privacy in relation to the publication of the photograph.

<sup>126</sup> See Chapter Three, Part Three (Common Law Action for Invasion of Privacy) 106–107.

<sup>127</sup> See, generally, the discussion of express and implied consent in ALRC, *Serious Invasions of Privacy*, above n **Error! Bookmark not defined.**39, 198–200.



threshold.<sup>128</sup> In any event, the factors that would be used by the court to determine whether the invasion was serious (or highly offensive) are likely to be wide-ranging and could include the degree of offence and distress, the motivation and knowledge of the defendant, and the nature and extent of the publication.<sup>129</sup> The fact that Tim suffered distress and embarrassment from publication of the image will not be conclusive.<sup>130</sup>

The fact that the photograph was published on a publicly accessible Facebook page, with a potentially unrestricted audience, could result in the invasion being considered 'serious'.<sup>131</sup> On the other hand, the nature of the publication (on an individual's Facebook page) is quite different from the nature of publication of an image such as this in the media, or to illustrate a website about obesity, for example. Although Kieren's Facebook page is publically accessible, the extent to which it is actually accessed by the public in general is probably far less than the extent to which a news story or informational web page is accessed. The purpose of placing an image on a social media site, designed to facilitate the communication of information about oneself and others, is also quite different to the purpose served by the incidental use of a photograph to illustrate a news story or website.

If Tim was able to establish that Kieren was motivated by malice in publishing the photograph, any invasion of privacy is more likely to be judged as serious. Related to Kieren's motives, is the question of whether liability for invasion of privacy would attach only to 'wilful' invasions of privacy,<sup>132</sup> or whether it would attach to those that were negligent,<sup>133</sup> or in circumstances where a reasonable person would know that intrusion, misuse or disclosure was obviously or substantially likely to follow.<sup>134</sup> Depending on how 'intent' is defined, it may be difficult for Tim to establish this.<sup>135</sup>

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<sup>128</sup> Ibid.

<sup>129</sup> These are all factors which the ALRC has suggested would be taken into account by courts in determining whether an invasion was serious for the purpose of the statutory cause of action for invasion of privacy: see ALRC, *Serious Invasions of Privacy*, above n **Error! Bookmark not defined.**39, 132 [Recommendation 8-1] and 137 [8.35].

<sup>130</sup> Although it may be relevant. In the context of recommending the form of a statutory cause of action for invasion of privacy, the ALRC has noted that the 'actual effect of the invasion on the plaintiff may give some indication that the invasion was likely to have that effect': Ibid 136 [8.30]. If seriousness is judged from the perspective of a person of ordinary sensibilities in the position of the plaintiff then this will require the courts to consider the matter from the perspective of a person who is, like Tim, obese. However, if Tim is particularly sensitive about his weight issues and how he looks to others, as the case study suggests, then the seriousness element may not be met.

<sup>131</sup> See, eg, ibid 137 [8.35].

<sup>132</sup> See *Grosse* (2003) Aus Torts Reports ¶81-706, 64,187 [444] (Skoien DCJ).

<sup>133</sup> See *Doe v ABC* [2007] VCC 281 (3 April 2007) 52, 159 (Hampel J).

<sup>134</sup> ALRC, *Serious Invasions of Privacy*, above n39, 110 [7.7].

<sup>135</sup> See, eg, the discussion of the 'fault' element of the proposed statutory cause of action for invasion of privacy: Ibid 110 [7.7]. According to the ALRC, the requisite intention could encompass 'a subjective desire or purpose to intrude or to misuse or disclose the plaintiff's private information' or 'circumstances where such an intent may be imputed to the defendant on the basis that the relevant consequences — the intrusion, misuse or disclosure — were, objectively assessed, obviously or substantially likely to follow': at

If detriment, in the form of mental, physiological or emotional harm or distress is an element of the common law action for invasion of privacy,<sup>136</sup> it is likely that Tim would be able to satisfy this element due to his reaction to the image.

Finally there is the question of the public interest in free expression, which would need to be balanced against Tim's interest in protecting his privacy. Factoring freedom of expression into the equation could well be fatal to Tim's claim, although much depends on the value that the courts are prepared to place on that freedom when compared to Tim's privacy interest (or Tim's own interests in free expression<sup>137</sup>). The relevant consideration here is not simply the extent to which a person should be free to publish photographs of another, but the extent to which the ability of a person to sue another in a situation such as this would have a chilling effect on the use of social media, including by young people, to share and communicate information, including photographs, about themselves and others. The extent to which protecting Tim's privacy interest would impact on the various other interests (including economic interests) and freedoms of social media sites and those who wish to upload or access material and photographs on the internet will also need to be considered.

Overall, Tim is unlikely to be able to establish a common law action for invasion of privacy.

### *(b) Breach of Confidence*

In order to succeed in an action for breach of confidence, Tim would need to establish that the information possessed the necessary quality of confidence and that the defendant was under an obligation of confidence.

In relation to the requirement that information possess a 'quality of confidence' Tim could argue that the image conveys inaccessible and non-trivial information – that is, the way he looks without his shirt on. There is certainly an argument that while the way Tim looks fully clothed is generally accessible information (any number of people see him on any given day), the way he looks without his shirt on may be relatively inaccessible. It is true that Tim removed his shirt in a public place, but arguably this made the 'information' (how he looks without his shirt) accessible only to a relatively limited audience, rather than to the public at large — at least, this was the case until the photograph of Tim was uploaded

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110 [7.7]. A definition of intention that encompasses imputed intention means that a plaintiff does not necessarily have the burden of proving that a defendant actually turned their mind to the invasion or privacy (or misuse or disclosure of private information): at 117 [7.15]. However, the Commission makes it clear that intention must attach not only to the action that invades the plaintiff's privacy but requires that the defendant: 'needs to have been aware of the facts from which it can be objectively assessed whether or not the plaintiff had a reasonable expectation of privacy and of the facts that an intrusion or disclosure would (or in the case of recklessness, may) occur': at 116 [7.35]. An example given by the ALRC of a situation in which the requisite intention element would *not* be satisfied is that of a photographer who photographs a public event without realising that the photograph captures a private activity (for example, people inside a building) in the background: at 116 [7.37].

<sup>136</sup> Grosse (2003) Aus Torts Reports ¶181-706, 64,187 [444] (Skoien DCJ).

<sup>137</sup> This will be discussed further in Chapter Five.

to Facebook. Even so, if a person has taken few or no steps to protect the inaccessibility of the information presented in a public place, the chances of that information being regarded as confidential will diminish. The fact that Tim removed his shirt in a public place and made no attempt to seek a level of seclusion (such as is the case, for example, where a person retires to a doorway or a more secluded spot to change clothes) suggests that no effort was made to guard the accessibility of the information (how he looked without his shirt on). This, alone, would probably be fatal to any claim for breach of confidence.

Besides identifying the non-triviality and inaccessibility of information, the courts have tended to adopt a recognition approach to identifying information that can be considered confidential. In the case of personal information, this involves considering whether the information is 'private'. As noted in Chapter Three, there is a dearth of Australian authority as to the test that should be applied in determining whether information is 'private' for this purpose. However, if the current UK approach were to be adopted, it would need to be determined, as a minimum, that the person seeking to restrain or obtain a remedy for the misuse of the information had an expectation of privacy in relation to the use of the information. As noted in the previous section, Tim would face considerable challenges demonstrating a reasonable expectation of privacy in relation to the publication of the photograph.

There is also some possibility that Tim could argue that information was confidential because Kieren knew that Tim did not wish the information (the photograph) to be taken or published. Gurry suggests that actual knowledge of special circumstances can serve to imbue information with a quality of confidence it would otherwise not possess.<sup>138</sup> This argument only has a chance of success if Tim can establish that he specifically requested Kieren not to take the photograph at all, or requested that the photograph not be published online.

Even if the photograph of Tim<sup>139</sup> is considered to have the necessary quality of confidence (or be capable of protection under the action for breach of confidence based on a privacy test), Tim would still need to establish that Kieren was under an obligation of confidence, which he then breached.<sup>140</sup> In Tim's case there is no pre-existing relationship of

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<sup>138</sup> Francis Gurry, *Breach of Confidence* (Clarendon Press, 1984) 78–81, citing three cases in which information has been held to be confidential between two parties, even where the information itself was public knowledge, on the basis that it is 'associated with a particular context and the confidant knows or should know that the association of the information with the context is a matter of special significance, peculiar sensitivity or confidentiality': at 80–1. The argument in Tim's case, then, would be that the publication of these images in the context of Facebook was something that Kieran knew or should of known was a matter of special significance, sensitivity or confidentiality. However, there are no cases known to the author which apply this principle in a context similar to that of Tim's and it would, in any event, be difficult for Tim to establish that Kieran did know that publication would be a matter of particular significance, sensitivity or confidentiality.

<sup>139</sup> Or, further to the argument made immediately above, the publication of the photograph on Facebook rather than the photograph itself.

<sup>140</sup> See Chapter Three, Part Three (Breach of Confidence), esp 115–117.

confidence between Kieren and himself at the time that Kieren takes the photograph, unless perhaps Tim specifically asked Kieren not to take the photograph, or indicated that he did not wish to be photographed.<sup>141</sup> It is also possible that Kieren would be placed under an obligation of confidence if Tim subsequently requested him not to show the photograph to anyone, or specifically asked that it not be put online.<sup>142</sup>

It has been accepted that an obligation of confidence can arise where information has been improperly or surreptitiously obtained.<sup>143</sup> Here the photograph was not taken surreptitiously. Nevertheless, the information may be regarded as having been obtained ‘improperly’ if this word is interpreted widely so as to mean against the wishes of the image subject, rather than unlawfully.<sup>144</sup> Therefore, if Tim can show that he had made it clear that he did not wish to be photographed (or that he did not wish the photograph to be published), the information might be regarded as having been improperly obtained.

As discussed in the preceding chapter, it is less clear whether, in Australia, the *nature* of the information is sufficient in and of itself to place the person obtaining it under an obligation of confidence.<sup>145</sup> Even so, where — as here — the information has not been obtained by intrusion into seclusion or covert means, and it is difficult to describe the information as ‘obviously private’, establishing the obligation will be difficult. However, should Tim be able to establish that the information itself was confidential due to Kieran’s

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<sup>141</sup> In fact, if a pre-existing relationship of confidence can be said to exist then this, arguably, makes it more likely that the photographs will be treated as private information: so, for example, in *McKennit v Ash* [2006] EWCA Civ 1714 and *Lord Browne of Madingley v Associated Newspaper Ltd* [2008] QB 103 the fact that information was obtained in the course of a pre-existing confidential relationship ‘had a significant bearing on whether the claimant had a reasonable expectation of privacy in respect of the information disclosed’: Nicole Moreham, ‘Breach of confidence and misuse of private information. How Do the Two Actions Work Together?’ (2010) 15 *Media and Arts Law Review* 265, 268.

<sup>142</sup> It must be remembered, however, that an obligation of confidence can only exist if the information itself is confidential — in other words, a request to keep information to oneself does not suffice to place the subject of the request under an obligation of confidence unless the information is confidential in the first place. There is also a question as to whether it is sufficient to impose an obligation of confidence upon the recipient to notify the recipient of the information as to its confidential nature *after* the information has been received: see Megan Richardson, ‘Surreptitiously or Accidentally Obtained Information and Privacy: Theory versus Law’ (1993–94) 19 *University of Melbourne Law Review* 673, 689 n 114 referring to the different approach taken in *Seager v Copydex* [1967] 2 All ER 415, suggesting that it is sufficient, and *Fractionated Cane Technology Ltd v Ruiz-Avalla* [1988] 7 Qd R 610, suggesting that it is not.

<sup>143</sup> *Lenah* (2001) 208 CLR 199, 225 [39] where Gleeson CJ suggests that if the ABC had known the information was obtained improperly or surreptitiously that this would be sufficient to place them under an obligation of confidence, where the information itself was private.

<sup>144</sup> There is some suggestion that this is how the requirement would be interpreted: see Megan Richardson, ‘Surreptitiously or Accidentally Obtained Information and Privacy’, above n 142, 694 referring to *Franklin v Giddins* [1978] Qd R 72, which ‘indicates that unconscionable conduct, rather than unlawfulness in the obtaining is the standard to be applied.’

<sup>145</sup> In *Wilson* [2015] WASC 15 (16 January 2015) [56], Mitchell J observed that the ‘[t]he explicit nature of the images was itself suggestive of their confidential character’ — however, beyond the nature of the images ‘that character was confirmed by the discussions between the plaintiff and defendant, in which the plaintiff emphasised the deeply personal nature of the images.’

knowledge of special circumstances then it would seem to follow that that knowledge should be sufficient to place Kieran under an obligation of confidence.

It is possible, then, that Kieren will be under an obligation of confidence but this is likely only if Tim made it clear that he did not wish to be photographed or, possibly, that he did not wish the photograph to be shown to anyone else or put online. If the photograph is copied by others onto their own Facebook pages, however, or indeed posted elsewhere on the internet, the obligation of confidence would be unlikely to extend to those others.<sup>146</sup>

Even assuming that Tim is able to make out the elements of breach of confidence, questions would arise as to whether, and if so how, considerations such as Kieren's right of freedom of expression would be brought into the equation. Although in the UK Kieren's right to freedom of expression will necessarily be balanced against Tim's interest in maintaining his privacy, whether the public interest in freedom of expression generally amounts to a defence in Australia is more difficult to say.<sup>147</sup> It seems highly likely, however, that freedom of expression and other matters of public interest would be factored in at some stage — if not as a 'defence' to the action then as part of the determination as to whether the information itself possessed a 'quality of confidence'.

If Tim were successful in establishing an action for breach of confidence (which, overall, is unlikely), it is not clear that he would succeed in securing an injunction requiring the removal of the photograph by Kieren from Facebook. Certainly courts are less likely to award an injunction if the posting of the photograph on Facebook has put the information conveyed by the image into the public domain such that an injunction would be futile.<sup>148</sup> As discussed in Chapter Three, however, whether information is in the public domain is a question of fact, and the mere fact of publication on a social media site does not automatically mean that information has entered the public domain.

The public interest in Kieren having the freedom to express himself (by communicating his photographs online) might also be a consideration in determining what remedy should be available to Tim, where the action for breach of confidence is made out.<sup>149</sup>

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<sup>146</sup> This is for reasons discussed in Chapter Three, Part Three (Breach of Confidence), namely that there is little Australian authority for the proposition that an obligation of confidence can be imposed merely due to the nature of the information, but even if this is the case it is likely that an obligation would be imposed only where information was 'obviously' confidential: see esp 115-6.

<sup>147</sup> See Chapter Three, Part Three (Breach of Confidence) 119. Again, though, there may be an exception if Tim is able to show that he specifically requested Kieren not to take the photograph or to refrain from publishing it or showing it to anyone.

<sup>148</sup> As to a discussion of futility arguments in relation to breach of confidence actions, see Chapter Three, Part Three (Breach of Confidence) 120-121.

<sup>149</sup> For example, it may be that Kieren's claim to freedom of expression would militate against the grant of an injunction, even where the breach of confidence is established. This would be by analogy with defamation cases where injunctions are only 'grudgingly' given due to free speech concerns; see comments

In the unlikely event that the action for breach of confidence is established, Tim would be able to notify Facebook of the existence of the confidential information. Facebook may then decide to remove the information. Although the terms and conditions would permit removal, they do not oblige it.<sup>150</sup> However, the immunity from liability provided by clause 91(1) of schedule 5 of the *BSA* is lost once an internet content host becomes aware of the nature of information it is hosting. As such, a refusal to remove the material could result in Facebook being directly liable for a breach of confidence. Nevertheless, this is uncharted waters, given that no Australian cases have found an internet content host to be liable for breach of confidence in similar circumstances.

### *(c) Defamation*

In order for the photograph of Tim to be considered capable of being defamatory, Tim would need to establish that it conveys a meaning or meanings that would cause an ordinary decent person to think less of him, or to shun or avoid him, or possibly that the meanings conveyed would expose him to hatred, contempt or ridicule.<sup>151</sup> Given that the photograph is an authentic representation of what Tim actually looks like, an action for defamation will not be available unless, perhaps, the photograph of Tim posted on Facebook was accompanied by the addition of text or comments that could be regarded as conveying defamatory imputations. If, for example, comments suggested that Tim needed to exercise more, there would be an arguable imputation that Tim was lazy and that his weight issue was somehow his fault. Such an imputation is more likely to be considered capable of being defamatory, although even where the defamatory capacity of the matter is established it is still necessary to establish that it was in fact defamatory of the image subject.<sup>152</sup> Moreover, the person making the comments may be able to utilise a defence.<sup>153</sup>

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of Kirby J in *Lenah* (2001) 208 CLR 199, 286 [214] and 288 [221]; Chapter Three, Part Three (Breach of Confidence) 119-120.

<sup>150</sup> Facebook, Facebook, *Data Policy* (29 September 2016) < <https://www.facebook.com/policy.php> > (How We Use the Information We Receive).

<sup>151</sup> *Sim v Stretch* [1936] 2 All ER 1237, 1240 (Lord Atkin); *Youssouppoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, 587 (Slessor LJ); *Parmiter v Coupland* (1840) 6 M & W 105, 108 (Parke B); *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449; *Ettingshausen* (1991) 23 NSWLR 443. Danuta Mendelson writes that the test of exposure to hatred, contempt or ridicule has yet to be confirmed by the High Court: Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 2<sup>nd</sup> Edition, 2010) 780; nevertheless its existence was acknowledged in *Radio 2UE* (2009) 238 CLR 460, with the plurality commenting that the test had come to be regarded as too narrow (467–8 (French CJ, Gummow, Kiefel and Bell JJ)).

<sup>152</sup> So, for example, it would be necessary to establish that an imputation such as that referred to in above n **Error! Bookmark not defined.** was open to the ordinary, reasonable reader: see, eg, *Farquhar v Bottom* [1980] 2 NSWLR 380, 385 (Hunt J). In relation to this case study, there is an argument that a reader would understand the comments to be critical of McDonald's but not necessarily of the boy in the photograph.

<sup>153</sup> The defence of truth, or justification, may be open to the defendant should the defamatory imputations be established: see further Chapter Three, Part Three (Defamation) 124-125. The common law defence of fair comment now exists alongside the statutory defence of honest opinion: see, eg, *Defamation Act 2005* (WA) s 31 – however, whether an opinion defence would be open here is doubtful because a basis of relying on the defence is that the opinion related to a matter of public interest: *Defamation Act 2005* (WA)

An action for defamation is not likely to be made out here.

*(d) Intentional or Negligent Infliction of Harm or Harassment*

An action for intentional or negligent infliction of harm or for harassment is not available unless a person has suffered a recognised psychiatric injury.<sup>154</sup> As Tim appears to be merely distressed or embarrassed by the publication of the photograph, he is unable to rely on these causes of action. In any event, even if Kieren is aware that Tim does not like the photograph and even if Tim requests that the image be removed from Facebook, it would be difficult to prove that Kieren acted with intent to inflict harm, sufficient to establish an action for intentional infliction of harm or harassment.<sup>155</sup> It would also be difficult to establish that Kieren ought to have foreseen that a person of normal fortitude would be likely to experience mental harm (in the form of a recognised psychiatric injury), so as to establish the requisite duty of care for a negligence action.<sup>156</sup>

An action for intentional or negligent infliction of harm will not be made out.

*(e) Information Privacy Legislation*

The *Privacy Act* does not apply to the acts or practices of individuals<sup>157</sup> and will not, therefore, apply to Kieren.

It is less clear whether the *Privacy Act* applies to Facebook, given that the organisation has no physical presence in Australia.<sup>158</sup> If the *Privacy Act* does apply to Facebook then that organisation will need to comply with the APPs in relation to its collection of information and the use and storage of personal information where it is held 'in a record'.<sup>159</sup>

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s 31(1)(b) and see, eg, *Bellino v ABC* [1996] 185 CLR 183 (28 March 1996) [16] (Dawson, McHugh and Gummow JJ).

<sup>154</sup> In relation to an action for intentional infliction of harm, the majority of the court in *Giller* (2008) 24 VR 1 held that recognised psychiatric injury was necessary to establish an action (although Maxwell P favoured the development of such an action to compensate for emotional distress falling short of recognised psychiatric injury): at 6 [7].

<sup>155</sup> See Chapter Three, Part Three (Intentional Infliction of Harm) 133-134 and (Harassment) 137.

<sup>156</sup> See Chapter Three, Part Three (Negligent Infliction of Harm) 135-136.

<sup>157</sup> *Privacy Act* s7B(1).

<sup>158</sup> Bunn, above n 67, 48; Aashish Srivastava, Roger Gamble and Janie Boey, 'Cyberbullying in Australia: Clarifying the Problem, Considering the Solutions' (2013) 21 *International Journal of Children's Rights* 25, 38 noting that Facebook's servers are not located in Australia. Where information is not collected in Australia, the circumstances in which the *Privacy Act* will have extraterritorial application are not entirely clear. See also Chapter Three, Part Three (Federal Information Privacy Laws) 147-148; Bunn, above n 67. Nevertheless the OAIC has expressed the view that any personal information uploaded from a computer located in Australia is information that is collected in Australia, albeit that it is never stored on a server within Australia: Telephone Conversation with Carl, OAIC Enquiry Officer (2 September 2015).

<sup>159</sup> The terms 'collect' and 'record' are defined in the *Privacy Act* s 6(1). An entity 'holds' information only if the entity has in its possession or control a record containing the personal information: *Privacy Act* s 6 (1).

The photograph can constitute personal information under the *Privacy Act* if Tim is identified or reasonably identifiable in it.<sup>160</sup> Because the photograph is tagged, and given that Tim is also a user of Facebook, the image of Tim will probably be considered ‘personal information’ in the hands of Facebook: this is because tags are automatically linked back to user’s accounts.<sup>161</sup> Given that the definition of ‘record’ includes photographs and information in pictorial form, the images of Tim will be considered a ‘record’.

The posting of photographs onto a Facebook user’s site may therefore need to be considered by reference to APP 3, relating to information that is collected by solicitation, or APP 4, relating to information that is received by an organisation but not solicited.<sup>162</sup> In either case, to comply with those APPs the collection or receipt of photographs that are not sensitive information must be reasonably necessary for one or more of the organisation’s functions or purposes.<sup>163</sup> Facebook could almost certainly argue that the collection of photographs and even associated information (such as tags) is necessary, given that the sharing of personal information by members about themselves and others is the very reason users open a Facebook account.

Collection of information must also be by lawful and fair means and information, other than sensitive information, should be collected directly from the individual to whom it relates, unless this is unreasonable or impracticable.<sup>164</sup> Again, given the function that Facebook serves, and given that copyright in images generally resides with the photographer rather than the image subject,<sup>165</sup> it would be unreasonable to stipulate that photographs should be ‘collected’ only from individual or individuals the subject of any given photograph.

If the photograph of Tim is considered sensitive information, however, it must not be collected without Tim’s consent. It is possible that Tim’s photograph would be considered sensitive information in the hands of Facebook either because it is biometric information, or because it is considered ‘health’ information.<sup>166</sup> However, given that Tim is also a Facebook user, he may be taken to have consented to the collection of his information by Facebook, by virtue of agreeing to the Facebook Terms upon signing up as a Facebook member, although this is by no means clear-cut.<sup>167</sup>

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<sup>160</sup> *Privacy Act* s 6(1).

<sup>161</sup> See further, Bunn, above n 67.

<sup>162</sup> For a discussion as to whether information posted by a Facebook user can be considered to have been solicited by Facebook or not, see Bunn, above n 67, 58.

<sup>163</sup> *Privacy Act* sch 1, APPs 3.2, 4.1.

<sup>164</sup> *Ibid* APPs 3.5, 3.6.

<sup>165</sup> *Copyright Act 1968* (Cth) s 35

<sup>166</sup> For a discussion of when photographs are also biometric information, see Chapter Three, Part Three (Federal Information Privacy Laws) 148-149 and Bunn, above n 67, 57.

<sup>167</sup> See further *ibid* 60 and 61. The question of whether agreeing to Facebook’s Terms is sufficient to constitute consent for this purpose is a complex one. Essentially this is because in order to comply with the *Privacy Act*, consent must be provided voluntarily, and the person providing the consent must have the



In short then, it is unlikely that the posting of Tim's photograph onto Facebook would constitute a non-compliance with the APPs relating to the collection (or receipt) of personal information, even assuming that the *Privacy Act* applies to Facebook in the first place.<sup>168</sup>

If Facebook is bound by the APPs in relation to the photograph of Tim, it may also need to comply with the APPs in Part 3 (dealing with personal information). This principle governs the use and disclosure of information 'held' by an APP Entity. An APP Entity holds information if it has possession or control of a record that contains the personal information.<sup>169</sup> Here the definition of record excludes a generally available publication.<sup>170</sup> Although Tim's photograph is generally available on the internet, the fact that Facebook also collects and holds the photograph in a repository that is not available to the public<sup>171</sup> means it is likely to be subject to the APPs in Part 3. These APPs suggest that Facebook should not use the information about Tim for a purpose other than the primary purpose (inclusion in the social media site) without Tim's consent (or unless other conditions are satisfied). Given that Tim has a Facebook account, he has agreed to Facebook's terms and conditions, which set out the uses that Facebook makes of a user's information (including information collected from others).<sup>172</sup> Provided that the information is used in accordance with these terms, it is unlikely that Facebook will be in breach of the APPs that apply to dealings with personal information.

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capacity to understand and communicate it: ALRC, *For Your Information*, above n 9, vol 1, 669 [19.9]. In determining whether consent has been provided voluntarily, the ALRC notes that this will depend, *inter alia*, on whether an individual has a clear option not to consent, and whether the consent is given specifically and not bundled with other purposes: ALRC, *For Your Information*, above n 9, vol 1, 669 [19.10]. In the context of Facebook, there is an argument that an individual's consent to the data use policy is bundled with other purposes (the security check) and that those other purposes take prominence over the consent so that an individual's consent to the collection of sensitive information is ineffective: see further the discussion in Anna Bunn, 'Facebook and Face Recognition: Kinda Cool, Kinda Creepy' above n 67, 60-1.

<sup>168</sup> If the image of Tim is considered personal information (likely) then it will also be considered a 'record' (within the meaning of *Privacy Act* s 6(1)). As such the APPs in *Privacy Act* sch 1, pt 3 (Dealing with personal information) will govern Facebook's use and disclosure of this information. The provisions in Part 3 suggest that Facebook should not use the information about Tim for a purpose other than the primary purpose (inclusion in the social media site) without Tim's consent or if other conditions are satisfied. Given that Tim has a Facebook account, he has agreed to Facebook's terms and conditions which set out the uses which Facebook makes of a user's information (including information collected from others) (as to which see Facebook, Facebook, *Data Policy* (29 September 2016) < <https://www.facebook.com/policy.php> > (How We Use the Information We Receive). Provided that the information is used in accordance with these terms, it is unlikely that Facebook will be in breach of any of the privacy principles in Part 3.

<sup>169</sup> *Privacy Act* s 6(1) – definition of 'holds'. A record, in turn, includes a document but does not include a generally available publication: s 6(1) – definition of 'record'.

<sup>170</sup> *Privacy Act* s 6(1).

<sup>171</sup> Jennifer Lynch, Submission to Senate Committee on the Judiciary, Subcommittee on Privacy, Technology and the Law, *What Facial Recognition Technology Means for Privacy and Civil Liberties*, 18 July 2012, 2.

<sup>172</sup> Facebook, *Data Policy* (29 September 2016) < <https://www.facebook.com/policy.php> >.

*(f) Enhancing Online Safety for Children Legislation*

It is unlikely that the photograph of Tim would be considered ‘cyberbullying material targeted at an Australian child’ under the *Online Safety Act*. In order to fall within the definition, material must be such that an ordinary person would conclude that ‘it is likely that the material was intended to have an effect on a particular Australian child’ and the material would be likely to have the effect on the child of ‘seriously threatening, seriously intimidating, seriously harassing or seriously humiliating’ that child.<sup>173</sup> Although Tim feels humiliated by the photograph it not clear that Kieran intended the photograph to have any particular effect on Tim. However, even if it can be established that Kieran did intend the image to have an effect on Tim, it is far from clear that the photograph would be considered ‘seriously humiliating’.<sup>174</sup> The addition of text, however, could result in the material being regarded as ‘cyberbullying material targeted at an Australian child’.

If the photograph of Tim was considered ‘cyberbullying material targeted at an Australian child’, and given that Facebook is listed as a Tier 2 social media service, the e-Safety Commissioner would have power to investigate and issue a social media service notice, upon receipt of a complaint from Tim (or a person acting on his behalf) and provided that other conditions were met.<sup>175</sup> The e-Safety Commissioner could also issue an end-user notice to Kieran, which could require him to take all reasonable steps to remove the material, among other things.<sup>176</sup>

*(g) Contract/Internet Content Regulation/Industry Regulation*

In relation to the publication of the photograph on Facebook, Tim could certainly request Facebook itself to remove his photograph. However, this request is unlikely to meet with success. Facebook has the right to remove content, including photographs, which violate its Statement of Rights and Responsibilities or its Policies.<sup>177</sup> Material will violate Facebook’s Statement of Rights and Responsibilities if, for example, it is discriminatory, unlawful, malicious or misleading,<sup>178</sup> is used to bully, harass or intimate any user,<sup>179</sup> or constitutes hate speech, is threatening, or contains nudity.<sup>180</sup> In the case of Tim, neither the capture nor the publication of this photograph is likely to involve any violation of these terms and therefore Facebook would be very unlikely to remove the image.<sup>181</sup>

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<sup>173</sup> *Online Safety Act* s 5.

<sup>174</sup> See Chapter Three, Part Three (Enhancing Online Safety for Children Legislation) 150-151.

<sup>175</sup> *Online Safety Act* s 35.

<sup>176</sup> *Ibid* s 42.

<sup>177</sup> Facebook, *Statement of Rights and Responsibilities* (30 January 2015) <<https://www.facebook.com/legal/terms>> term 5(2).

<sup>178</sup> *Ibid* term 3(9).

<sup>179</sup> *Ibid* term 3(6).

<sup>180</sup> *Ibid* term 3(7).

<sup>181</sup> Indeed, Facebook appears to have been slow to remove content which is obviously offensive: see, eg, Srivastava, Gamble and Boey, above n 158, 36. The Facebook Community Standards inform users that Facebook will remove photographs of nudity — this includes photographs of the female breast ‘if they include the nipple’ (other than photographs of women actively breastfeeding etc). Therefore, the

*(h) Summary of the Legal Position for Case Study Two*

Regardless of the fact that Tim does not wish his photograph to be published on the internet, and regardless also of the impact of the publication upon him, Tim is unlikely to have any legal remedy in respect of the publication of his photograph.

Even if a common law action for invasion of privacy is recognised, Tim is unlikely to be able to establish a reasonable expectation of privacy because he was in a public place when the photograph was captured and the information communicated by the image does not depict Tim in a humiliating or distressing situation and is otherwise not 'inherently private'. Should Tim succeed in establishing the elements of an invasion of privacy action, however, public interest considerations in protecting free expression may outweigh Tim's privacy claim and thus prove fatal to it. That is, in developing any common law action for invasion of privacy, Australian courts are likely to take note of the ALRC recommendations on the form of any statutory tort for invasion of privacy.<sup>182</sup> Those recommendations seek to balance the 'right' to privacy with the rights and freedoms of others by requiring a court to be satisfied that the public interest in privacy outweighs any countervailing public interest,<sup>183</sup> and has stressed that freedom of expression may be 'the most common interest at stake'.<sup>184</sup> Moreover, Australian courts have already indicated that they will factor in the public interest in determining privacy claims,<sup>185</sup> and this is likely to include the public interest in freedom of expression. As such, an argument would likely be raised that the taking and/or publication on social media of photographs in public places is a legitimate exercise in freedom of expression and this argument may well succeed.<sup>186</sup>

Likewise, an action for breach of confidence is unlikely to be made out because the information was probably too accessible. That is, although the way Tim looked without his shirt was observable by only a few people (those present in the park), Tim cannot claim that he expected to go unobserved nor demonstrate that he took steps to limit the accessibility of the information. Moreover, the nature of the information here is unlikely to be regarded as obviously private. Questions of accessibility aside, an obligation of confidence is unlikely to be established vis-a-vis Kieren (or Facebook).

The photograph of Tim of itself does not communicate any untrue imputations that are capable of being defamatory, so an action in defamation is unavailable.

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photograph of Tim having removed his top is not considered nudity and will not be restricted on this basis. See Facebook, Community Standards (2 September 2015) <<https://www.facebook.com/communitystandards#>> (Encouraging Respectful Behaviour/Nudity).

<sup>182</sup> ALRC, *Serious Invasions of Privacy*, above n **Error! Bookmark not defined.**39.

<sup>183</sup> Ibid 144 [Recommendation 9-1]. See also ALRC, *For Your Information*, above n 9, vol 3, 2584 [Recommendation 74-2].

<sup>184</sup> ALRC, *Serious Invasions of Privacy*, above n **Error! Bookmark not defined.**39, 146 [9.17].

<sup>185</sup> Grosse (2003) Aus Torts Reports ¶181-706, 64,187 [447]; *Doe v ABC* [2007] VCC 281 (3 April 2007) [163].

<sup>186</sup> See the further discussion on this in Chapter Six, Part Three (A), esp pp 299-300.

Even if Tim suffers a recognised psychiatric illness as a result of the publication of his photograph, he is unlikely to be able to establish the requisite intention or foreseeability on Kieren's part to establish an action for intentional or negligent infliction of harm or for harassment.

It is unlikely that any interference with privacy under the *Privacy Act* has occurred. Although Tim can request Facebook to remove the photograph, it is under no obligation to do so and probably will not do so because the photograph does not appear to contravene any of its own terms of use. As the material is unlikely to be considered cyberbullying material targeted at an Australian child, Tim will not be able to enlist assistance from the e-Safety Commissioner to secure removal of the image from Facebook.

Thus, not only will Tim be unable to require Kieren to delete the photograph from his Facebook page (and will almost certainly not succeed in having the photograph deleted by Facebook itself), he has no grounds for any redress at all in respect of this unwanted publication.

### C Case Study Three (Alison)

#### 1 Scenario

Alison Chang is photographed by her church counsellor who later posts the photograph onto Flickr, a photo-sharing website. The photographer publishes the image under a Creative Commons licence, which allows for commercial use.<sup>187</sup> Alison's photograph is copied from Flickr and used by Virgin mobile in an advertisement for the company. The advertisement takes the form of several billboard posters and uses Alison's photograph under the heading 'Dump your pen friend'. At the bottom of the picture are the words 'Free Text Virgin to Virgin', and the Virgin logo. Several weeks after the photograph is uploaded to Flickr, Alison receives an email from one of her friends attaching the photograph (reproduced below) of her appearing in the advertisement. That photograph is subsequently uploaded to the internet and attracts the attention of 'news stations, legal commentators, and online bloggers'.<sup>188</sup> As a result of the attention, Alison suffers embarrassment, humiliation and mental distress.<sup>189</sup>

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<sup>187</sup> *Chang v Virgin Mobile USA LLC* (19 October 2007), Dallas 3:2007cv01767 (Tex. Dist. Ct.) ('*Chang*') 3 and FN 6 explaining that the licence relied upon by Virgin was a Creative Commons Attribution 2.0 Licence.

<sup>188</sup> *Ibid* 4.

<sup>189</sup> *Ibid* first amended petition 5 [19].

## 2 Background and Key Features

This scenario is factual. It has been reported by a number of news services,<sup>190</sup> formed the subject of a legal action in the United States,<sup>191</sup> and been considered in at least one academic paper.<sup>192</sup> A photograph of the advertisement is reproduced below (Figure 4).



**Figure 4: Virgin advertisement featuring Alison Chang<sup>193</sup>**

A key feature of this scenario is that Alison consented to the photograph being taken, indeed posed for it, but may not have expressly consented to the initial posting of the photograph on Flickr (although she may not have objected to it) and certainly did not consent to the inclusion of her photograph in an advertisement.<sup>194</sup>

This case study is illustrative of a situation where embarrassment, humiliation or distress on the part of the image subject arises not from the initial online publication of an image, but from its subsequent use (or ‘re-contextualisation’). It is interesting at this point to

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<sup>190</sup> See, eg, Associated Press with Asher Moses, ‘Virgin Sued for Using Teen’s Photo’ *The Sydney Morning Herald* (online), 21 September 2007 <<http://www.smh.com.au/news/technology/virgin-sued-for-using-teens-photo/2007/09/21/1189881735928.html>>; Monica Hesse, ‘Hey, Isn’t That ...?’ *Washington Post* (online), 9 January 2008 <<http://www.washingtonpost.com/wp-dyn/content/article/2008/01/08/AR2008010804626.html>>.

<sup>191</sup> *Chang* (19 October 2007), Dallas 3:2007cv01767 (Tex. Dist. Ct.).

<sup>192</sup> Emma Carroll and Jessica Coates, ‘The Schoolgirl, the Virgin and the Billboard’ in Brian Fitzgerald and Mark Perry (eds), *Knowledge Policy for the Twenty-First Century: A Legal Perspective* (Irwin Law, 2011) 181. A story in a similar vein was reported by ABC News in October 2011 involving the use of an ABC Radio Presenter’s Twitter profile image: see Ashley Hall and Staff, ‘Blackberry Pinches Colvin’s Twitter Pic for Ad’ *ABC News* (online), 29 October 2011 <<http://www.abc.net.au/news/2011-10-28/blackberry-ad-used-colvin-photo-without-permission/3607330>>.

<sup>193</sup> This image was reproduced from Flickr, where it was posted by Brenton Cleeland (27 May 2007) <<https://www.flickr.com/photos/sesh00/515961023>>.

<sup>194</sup> See *Chang* (19 October 2007), Dallas 3:2007cv01767 (Tex. Dist. Ct.) Plaintiffs’ First Amended Pleadings, 3 [11] and as also noted by Alison’s brother, Damon Chang, in a reply to a Flickr Discussion post regarding the Virgin advertising campaign: teacherjamesdotcom, Virgin Mobile Advertising Campaign Using Flickr Photos (28 June 2007) on Flickr Central <http://www.flickr.com/groups/central/discuss/72157600541608353/72157602096415462/> (reply to post by sesh000).

recount a similar but much older situation involving Abigail Roberson, a ‘modest young woman’ whose picture was, without her consent, used on an advertisement for Franklin Mills Flour. When Abigail brought an action against the advertiser, the court described her reaction in the following terms: she was “‘mortified” that her face had been turned into an object and spectacle — “a method of attracting widespread public attention to ... wares.”’<sup>195</sup>

In this case study the use of Alison’s image occurs within an offline context, as well as an online one, and it is the particular context in which the image has been used (the billboard advertisement) that Alison objects to and that has given rise to further republication of the image online. This case study therefore highlights the difficulty of drawing distinctions between the offline and online context for the purpose of designing a legal response, and gives rise to an important question: should the publication of images offline be subject to different regulation than the publication of images online? That question is not addressed in this chapter, but is returned to in Chapter Six, with reference back to this case study.

Although Alison Chang is American, for the purpose of this chapter it will be assumed that Alison is Australian and resides in Australia. The advertisements the subject of this case study did, in fact, appear in Australia.<sup>196</sup>

### 3 *Discussion of Law*

#### *(a) Action for Invasion of Privacy*

Even if a common law tort for invasion of privacy is recognised, it will be difficult for Alison to establish a reasonable expectation of privacy. The image itself does not reveal private information or a private activity, and was not taken in circumstances involving an intrusion upon Alison’s seclusion. There may be room to argue that the image must be considered with the text ‘Virgin to Virgin’ and that, when taken with the text, there is a communication of private information (information about Alison’s sexual experience). The fact that an image has been used in a particular context, in this case commercial, without consent (often referred to as ‘appropriation’)<sup>197</sup> is unlikely, in itself, to give rise to

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<sup>195</sup> Samantha Barbas, ‘From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption’ (2013) 61 *Buffalo Law Review* 1119, 1119 citing *Roberson v Rochester Folding Box Co*, 64 N.E. 442 (N.Y. 1902) 450 (Gray J dissenting). It seems, however, that Abigail Roberson was not merely mortified but ‘that she was made sick and suffered a nervous shock, was confined to her bed and compelled to employ a physician’: *Roberson v Rochester Folding Box Co*, 64 N.E. 442 (N.Y. 1902) 543. Nevertheless, the majority found against Ms Roberson. Parker J (with whom O’Brien, Cullen and Werner JJ agreed, held that ‘[a]n examination of the authorities leads us to the conclusion that the so-called “right of privacy” has not yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided’: *Roberson v Rochester Folding Box Co*, 64 N.E. 442 (N.Y. 1902) 556.

<sup>196</sup> Carroll and Coates, above n 192, 181.

<sup>197</sup> In the United States, the tort of ‘appropriation of identity’ is one of the four US privacy torts as enumerated by William L Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383, 401–6. According to Prosser, the tort of appropriation concerns the taking and use of the plaintiff’s name or likeness for the defendant’s own advantage, which at common law is not necessarily pecuniary: at 405. Where the tort has

a reasonable expectation of privacy for the purposes of an action in Australia. There is judicial opinion that an appropriation of image is more likely to be concerned with the plaintiff's financial and non-dignitary interests, rather than the plaintiff's privacy.<sup>198</sup> It has also been suggested that other recognised causes of action in Australia may well provide recourse in relation to 'one or more' of the four invasions of privacy referred to in the US Restatement of the Law of Torts (which includes appropriation of likeness),<sup>199</sup> without the plaintiff having to resort to an action for invasion of privacy.<sup>200</sup> The discussion in the remainder of this section illustrates, however, that other legal actions are in fact unlikely to provide any recourse for Alison. This is so even though Alison is not motivated by the protection of the commercial value in her image, so much as in perhaps preserving her dignity, or autonomy, and/or seeking redress for the embarrassment, distress and humiliating that she has suffered. Nevertheless, absent the publication of clearly private information, and in view of judicial opinion referred to above, lower courts are likely to be reluctant to find that Alison had a reasonable expectation of privacy in relation to the appropriation of her image.

Alison would only succeed, therefore, if she was able to establish that she had a reasonable expectation of privacy that the image would not be published or used in the way in which it has been. As noted in the Case Study Two (Tim), Australian courts might be prepared to find that a person has a reasonable expectation of privacy vis-a-vis the publication of information that is not inherently private. One relevant factor here would be whether publication would be regarded as 'highly offensive to a reasonable person of ordinary sensibilities'.<sup>201</sup> It could be argued that disclosure of the photograph is highly

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been enacted into state law, many states have 'reworked' the tort to apply principally to pecuniary (rather than dignitary) harms arising from the appropriation of identity in a commercial context or as a quasi-property right of publicity: *Barbas*, above n 195, 1121. According to Prosser, the common law action was probably not so limited: Prosser, at 405.

<sup>198</sup> *Lenah* (2001) 208 CLR 199, 256 [125] (Gummow & Hayne JJ).

<sup>199</sup> US Restatement of the Law of Torts (Second) 1977 §652C.

<sup>200</sup> *Lenah* (2001) 208 CLR 199, 256 [125] (Gummow & Hayne JJ). The ALRC, making reference to that dicta, has expressly excluded from the form of its recommended statutory action for serious invasions of privacy the appropriation of images for commercial purposes, in so far as such an appropriation would not otherwise constitute an intrusion upon seclusion or the misuse of private information: ALRC, *Serious Invasions of Privacy*, above n 39, 88 [5.73]. On the other hand, the NSWLRC has expressed the view that the use of a person's name, identity, likeness or voice without authority or consent should properly be classified as an invasion of privacy where the harm suffered is mental distress rather than damage to commercial interests, and should be actionable: NSWLRC, *Invasion of Privacy*, Report No 120 (2009), 15 [4.5]. The use of Alison's image in the advertising campaign also, arguably, presents Alison in a false light by suggesting that she consented to and also that she was possibly paid for her participation in the campaign. False light claims are discussed further in the context of Case Study Four (Shabeeha).

<sup>201</sup> *Lenah* (2001) 208 CLR 199, 226 [42]. Referring to the paragraph of Gleeson CJ's judgment in *Lenah* from which the quote is taken, Lord Hope in *Campbell* stated that it was important to bear in mind the source of the offensiveness test 'and the guidance which the source offers as to whether the information is public or private'. Lord Hope then referred to the relevant source, being the US *Restatement of the Law of Torts (Second)* 1977 §652D and observed that the reference to the person of ordinary sensibilities was, as acknowledged by Gleeson CJ, a quotation from Dean Prosser who stated that 'the matter made public must

offensive, when judged from the perspective of a person of ordinary sensibilities in Alison's position. However, any particular sensitivity on Alison's part will be irrelevant in assessing whether publication would be regarded as highly offensive. There is nothing 'undignified or distraught'<sup>202</sup> about Alison's appearance. It is questionable whether an association between Alison and the company using her image (Virgin mobile) would be considered a dignitary harm, although there certainly is an argument that harm to dignity occurs by way of the use of the image in conjunction with the accompanying text. In determining whether Virgin's behaviour in publishing Alison's photograph would be likely to cause offense to a person in Alison's position, it is relevant to consider the reaction of other individuals, of whom there were several, whose photographs were, likewise, taken from Flickr and used in Virgin's campaign.<sup>203</sup> This evidence will not be conclusive, however, particularly if the individuals are not minors or have had their images used in different contexts and in conjunction with different text.

It is also possible that courts would be prepared to find that Alison had a reasonable expectation of privacy due to her age, for reasons already discussed in relation to Case Study Two (Tim).

Even if Alison were able to establish a reasonable expectation of privacy in relation to the use of the image by Virgin, she would need to overcome other hurdles, including the probable need to establish that the invasion was serious, or possibly highly offensive. As discussed above and in relation to Case Study Two (Tim), the fact that Alison herself has suffered distress as a result of the use of her image is not determinative of the seriousness of the invasion.<sup>204</sup> While the actual effect as well as the nature and extent of publication might be taken into account, the test of seriousness is essentially objective and it may be difficult for Alison to establish that the use of her image in this context would cause a person of ordinary sensibilities in her position offence, distress or dignitary harm, for reasons similar to those discussed above.

The fact that Alison found out about being part of the advertising campaign only after the posters were widely distributed and only because she was informed about it by a friend would be expected to cause a person in her position chagrin and annoyance, but not necessarily offence, distress or dignitary harm.<sup>205</sup> That said, the failure to establish

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be one which would be offensive and objectionable to a reasonable man, who must expect some reporting of his daily activities': *Campbell* [2004] 2 All ER 995, 1020 [94].

<sup>202</sup> To adopt the words of Lord Hope in *Campbell* [2004] 2 All ER 995, 1006 [31].

<sup>203</sup> *Chang* (19 October 2007), Dallas 3:2007cv01767 (Tex. Dist. Ct.) 3 noting that Alison's photograph was one of over 100 used in Virgin's 'Are you with us or what?' campaign.

<sup>204</sup> Except in so far as it can be argued that Virgin knew that the invasion would be likely to cause offence, distress or harm.

<sup>205</sup> As per the findings of the court in *Andrews* (Unreported, High Court of New Zealand, Allan J, 15 December 2006), where it was observed that the broadcasting of footage showing the plaintiffs in the aftermath of a car accident could not be considered highly offensive to a person of ordinary sensibilities in their position and noting that it was 'not the intrusion on the plaintiffs' privacy which lay at the heart of the proceeding,



offence, distress or dignitary harm does not mean that the invasion will not be considered serious.

Virgin is not motivated by malice in using Alison's image. However, courts in assessing seriousness might consider what the defendant knew or ought to have known about the fortitude of the plaintiff.<sup>206</sup> Although Alison is not personally known to the individuals responsible for the Virgin campaign, it is obvious from the image that she is a young person, probably a minor. It could be argued that Virgin should have known that the widespread publication of her image in this way would probably cause distress or, at least, entail serious consequences for the individual concerned. Whether Virgin had already received complaints from others whose images had been used without permission is also likely to be relevant.

Assuming Alison is able to establish a reasonable expectation of privacy in relation to the use of her image by Virgin and that the invasion was serious, Alison may also need to establish that she suffered detriment, in the form of mental, physiological or emotional harm or distress.<sup>207</sup> Given her reaction to the use of the image, it is likely that this element would be made out.

Alison might also need to establish that Virgin possessed the requisite intent, although it is unclear whether this would require a 'willed act',<sup>208</sup> a failure to exercise reasonable care,<sup>209</sup> or perhaps simply knowledge that intrusion, misuse or disclosure were obviously or substantially likely to follow when objectively assessed.<sup>210</sup> Unless a wilful invasion of privacy was required, it is likely that Alison could establish the requisite intent.

Alison would also need to establish that there is no public interest reason that outweighs her privacy claim. In this regard, the most relevant consideration is freedom of expression. Virgin has used Alison's image for commercial purposes but commercial expression is expression nonetheless.<sup>211</sup> On the other hand, in *Google*, the European Court of Justice regarded Google's interests in processing personal information as merely economic and, as such, insufficient to justify an interference with a data subject's personal

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but rather the plaintiffs' chagrin and annoyance at not being advised they were being filmed at close range, either at that time or later': at [69].

<sup>206</sup> Certainly this is one of the factors that the ALRC recommended courts be able to take into account: ALRC, *Serious Invasions of Privacy*, above n39, 137 [8.33].

<sup>207</sup> *Grosse* (2003) Aus Torts Reports ¶81-706, 64,187 [444] (Skoien DCJ).

<sup>208</sup> *Ibid*.

<sup>209</sup> See *Doe v ABC* [2007] VCC 281 (3 April 2007) 52, 159 (Hampel J).

<sup>210</sup> ALRC, *Serious Invasions of Privacy*, above n39, 110 [7.7].

<sup>211</sup> See, eg, *Google* (Court of Justice of the European Communities, C-131/12) Opinion of AG Jääskinen (25 June 2013) 1030 [122] ('Making content available on the internet counts as such as use of freedom of expression') and [132] ('An internet search engine provider lawfully exercises both his freedom to conduct business and freedom of expression when he makes available internet information location tools relying on a search engine').

information.<sup>212</sup> Against this it may be argued that in designing its campaign, Virgin has exercised creative judgement and deliberately chosen 'spontaneous' real-life images and that, therefore, the freedom claimed is freedom of artistic or creative expression.<sup>213</sup> In any event, Virgin would be unlikely to succeed in showing that their interest in freedom of expression overrode Alison's privacy interest, particularly as other options would have been open to Virgin that did not involve an infringement of Alison's privacy. Not least among those other options was that Virgin could have sought Alison's prior consent to the use of her image, or negotiated a reasonable amount of remuneration.

Virgin may also argue that Alison consented to the use of her image in this way by allowing herself to be photographed. However, it would be difficult for Virgin to establish that Alison's decision to pose for a photograph constituted express or implied consent to this particular use of her image (including the addition of the text). Although Alison posed for the photograph and clearly consented to it being taken, she presumably had little control and possibly no knowledge over the initial publication of her image online — or at least its publication subject to a free-use creative commons licence — and could argue that there was no consent to the particular disclosure or act complained of.<sup>214</sup> To what extent Alison's consent to being photographed can imply consent to the publication of photographs online is a difficult question.<sup>215</sup> Somewhat more straightforward is the question as to the extent to which being photographed in a private setting by a friend implies consent to the image being used for a widespread commercial advertising campaign.

On balance, Alison would be unlikely to succeed in establishing an actionable invasion of privacy at common law.

### *(b) Breach of Confidence*

To succeed in an action for breach of confidence, Alison would need to establish, inter alia, that the photograph communicated confidential information, being information that was both non-trivial and inaccessible. Here the photograph of Alison, taken by itself, communicates only how she looked on a particular day — this information is likely to be

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<sup>212</sup> *Google* ((Case C-131/12, 13 May 2014) [2014] QB 1022 (European Court of Justice) 1074 [81]. In the United States, commercial speech has traditionally been distinguished from other speech for the purpose of First Amendment protection: Tamara R Piety, 'Against Freedom of Commercial Expression' (2008) 29(6) *Cardozo Law Review* 2583, 2583, although Piety has argued that there is trend towards greater First Amendment protection of commercial speech: at 2585.

<sup>213</sup> Virgin Mobile, *Are you with us or what?* (16 July 2007), Flickr <<http://www.flickr.com/groups/379879@N24/discuss/72157600858275458>> stating that the campaign in which Alison's photograph was used was 'part of an approach designed to reject clichéd advertising in favour of more genuine and spontaneous shots.'

<sup>214</sup> It is not clear whether at common law consent to being photographed would be considered consent to publication. However, under the statutory cause of action for serious invasions of privacy proposed by the ALRC, consent to the act or disclosure complained of is a defence to an action: ALRC, *Serious Invasions of Privacy*, above n39, 198 [11.61].

<sup>215</sup> Refer also to the discussion on invasion of privacy in relation to Case Study Two (Tim) above.

regarded as both trivial and generally accessible. An argument could be made that the addition of the text 'Virgin to Virgin' changes the nature of what is communicated; that the word 'virgin' communicates information about her sexual experience which is non-trivial and inaccessible and that the text and the image are inextricably linked and should be considered together.<sup>216</sup> Alternatively, Alison could argue that she had a reasonable expectation of privacy in relation to publication of the image and that, on that basis, the image should be found to constitute confidential information. As discussed in the previous section, however, it is unlikely that Alison will be able to establish a reasonable expectation of privacy in relation to the use of the image.

In the (unlikely) event that Alison's photograph (or the photograph and text, taken together) is considered to be confidential information, Alison would still need to establish that Virgin Mobile was under an obligation of confidence not to misuse the information (the image and text). The image was not obtained by Virgin Mobile surreptitiously or improperly.<sup>217</sup> The information conveyed by the photograph itself is not inherently private although, as discussed above, there is an argument that the photograph and the text, taken together, do communicate inherently or obviously private information and an obligation on Virgin's part could be argued on that basis. It is far less certain that an obligation of confidence will be imposed simply on the basis that the person using the information knows or ought to know that there is an expectation of privacy in relation to *publication or use* of the information.

Given the above, an action for breach of confidence is unlikely to be made out.

### *(c) Defamation*

To sue for defamation Alison would need to establish, as a threshold issue, that the image communicates imputations that are capable of being defamatory by reference to the relevant tests.<sup>218</sup> The photograph in and of itself (divorced from the context of its use in the advertisements) does not communicate any imputations capable of being defamatory — showing only, as it does, Alison as she actually looked at the time the photograph was

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<sup>216</sup> As was the case in *Campbell* [2004] 2 All ER 995 – see, eg, 1028 [121] (Lord Hope) – see the discussion in Chapter Three, Part Three, (Breach of Confidence) 111-112.

<sup>217</sup> Although there may be some question as to whether Virgin complied with the terms of the Creative Commons Licence: see Carroll and Coates, above n 192, 192-4.

<sup>218</sup> Namely that the matter conveys a meaning or meanings that would cause an ordinary decent person to think less of her, or to shun or avoid her, or possibly that the meanings conveyed would expose her to hatred, contempt or ridicule: *Sim v Stretch* [1936] 2 All ER 1237, 1240 (Lord Atkin); *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, 587 (Slessor LJ); *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449; *Parmiter v Coupland* (1840) 6 M & W 105, 108 (Parke B); *Ettingshausen* (1991) 23 NSWLR 443. Danuta Mendelson writes that the test of exposure to hatred, contempt or ridicule has yet to be confirmed by the High Court: Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 2<sup>nd</sup> Edition, 2010) 780; nevertheless its existence was acknowledged in *Radio 2UE* (2009) 238 CLR 460, with the majority commenting that the test had come to be regarded as too narrow (467-8 (French CJ, Gummow, Kiefel and Bell JJ)).

taken. Alison would therefore need to establish that any defamatory imputation arose from the context of the use of the image or the accompanying text.<sup>219</sup>

Alison could argue that the heading 'Dump your pen friend' implies that she is the kind of person who would herself 'dump her friends' or encourage others to do so<sup>220</sup> and that this would cause an ordinary decent person to think less of such a person, or to hold them in contempt. However, Alison would still need to establish that those imputations were open to the reasonable reader.<sup>221</sup> This in turn would be subject to the challenge that the reasonable reader would not attribute the sentiment to Alison, but would properly regard the heading only as an advertising slogan concocted by Virgin.<sup>222</sup> As such, the defamatory capacity of the imputations would probably not even fall to be considered.

The words appearing at the bottom of the photograph ('Free Text Virgin to Virgin') may be taken to imply that Alison is a virgin, or that she is prepared to talk about her sex life in public. Even if such imputations are open (unlikely for the reasons discussed above), they would not be likely to negatively affect the standing of a girl of Alison's age in the eyes of an ordinary decent person. Again, then, this slogan will lack defamatory capacity, regardless of the fact that it might cause Alison personal embarrassment and may even subject her to ridicule from certain quarters.

Finally, Alison could argue that the context of the photograph implies that she has consented to the association of herself with the advertising campaign, and possibly that she received payment in return for the use of her photograph. Nevertheless, it is probably the case that 'an ordinary individual is not lowered in the esteem of his fellows if it is thought he receives a fee from an advertisement'.<sup>223</sup> An association with Virgin's advertising campaign in and of itself is unlikely to impact negatively on a person's standing, regardless of whether there is an imputation of reward.

#### *(d) Australian Consumer Law*

It may be possible for Alison to bring an action under the *ACL* on the basis that the advertisement constitutes misleading or deceptive conduct, or that it conveys misleading or deceptive representations.<sup>224</sup> As discussed in Chapter Three, a non-celebrity image subject may be able to bring an action for misleading or deceptive conduct or

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<sup>219</sup> See the discussion of imputations arising from context in Chapter Three, Part Three (Defamation) 125.

<sup>220</sup> One of the grounds for libel pleaded in the US action was that Virgin 'encouraged those who viewed the campaign to end their friendship with anyone who bears a resemblance to Alison.' See: *Chang* (19 October 2007), Dallas 3:2007cv01767 (Tex. Dist. Ct.) Plaintiffs' First Amended Petition <<http://docs.justia.com/cases/federal/district-courts/texas/txndce/3:2007cv01767/171558/22/>> 7 [27].

<sup>221</sup> See, eg, *Farquhar v Bottom* [1980] 2 NSWLR 380, 385 (Hunt J).

<sup>222</sup> That this was in fact how the slogans were interpreted is evident from comments cited in Carroll and Coates, above n 192, 195.

<sup>223</sup> Clifford L Pannam, 'Unauthorized Use of Names or Photographs in Advertisements' (1966) 40 *The Australian Law Journal* 4, 5.

<sup>224</sup> *ACL*, s 18(1). See also *ACL* s 29: concerning false and misleading representations relating to goods or services, and s 151: offences relating to false and misleading representations about goods or services.

representations where there is an implication that the image subject has endorsed or recommended the product or service being promoted.<sup>225</sup> Here, however, the advertisement does not suggest that Alison endorses the Virgin mobile products or services;<sup>226</sup> rather it can be taken to represent that Alison has consented to the use of her image in the advertising campaign. Any assumption on the part of those viewing the advertisement that Virgin required Alison's permission to use her image would be erroneous.<sup>227</sup> Nevertheless, a reasonable member of the public might well assume that Virgin would generally seek the express consent of those whose image it proposed to use in an advertising campaign.<sup>228</sup> On that basis it may be arguable that the overall impression created by the advertisement is that Alison consented to the use of her image in the advertisements.<sup>229</sup> Even if this representation can be said to have been conveyed, however, it is probably insufficient to found an action for misleading and deceptive conduct or representations — this is because the representation is likely to be considered 'commercially irrelevant'.<sup>230</sup>

*(e) Intentional or Negligent Infliction of Harm or Harassment*

It is not clear from the pleadings filed in the action whether Alison is claiming to have suffered a recognised psychiatric injury or illness, or whether she suffered 'only' embarrassment, humiliation and mental distress falling short of a recognised injury or illness.<sup>231</sup> Unless she has suffered a recognised psychiatric injury, an action for intentional or negligent infliction of harm or for harassment is not available.<sup>232</sup>

In any event, in order to claim for intentional infliction of harm or harassment it will be necessary to show that Virgin possessed the requisite mental element. Given that Virgin used the photograph as part of a wider campaign involving the use of over 100 Flickr images,<sup>233</sup> actual intent to cause harm to Alison, or indeed any of the other image subjects portrayed in the campaign,<sup>234</sup> will not be established. Whether intention can be imputed

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<sup>225</sup> See Chapter Three, Part Three (Actions under the ACL) 129-132.

<sup>226</sup> This conclusion is also reached by Carroll and Coates, above n 192, 196. Although Alison may try to argue that the advertisement is misleading because it implies that she is the kind of person who would 'dump' her pen-friend, such a representation is probably not open (for the same reason it is unlikely to be regarded as an imputation for the purpose of a defamation action): even if this representation were conveyed by the advertisement it is also commercially irrelevant.

<sup>227</sup> See *Talmax* [1996] QSC 34 (14 March 1996), 8 (Byrne J). On the relationship between an erroneous belief and misleading and deceptive conduct see *Campomar Sociedad Limited v Nike International Limited* (2000) 202 CLR 45, 83-7 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

<sup>228</sup> See, eg, *Talmax* [1997] 2 Qd R 444, 451 (Fitzgerald P, Davies JA, Moynihan J).

<sup>229</sup> See, eg, *Ibid.*

<sup>230</sup> See Chapter Three, Part Three (Actions under the ACL) 130-131.

<sup>231</sup> *Chang* (19 October 2007), Dallas 3:2007cv01767 (Tex. Dist. Ct.) Plaintiffs' First Amended Petition, 5 [19] <<http://docs.justia.com/cases/federal/district-courts/texas/txndce/3:2007cv01767/171558/22/>>.

<sup>232</sup> See *Giller* (2008) 24 VR 1 above n 154.

<sup>233</sup> *Chang* (19 October 2007), Dallas 3:2007cv01767 (Tex. Dist. Ct.) Memorandum Opinion and Order, 3 [10] noting that Alison's photograph was one of over 100 used in Virgin's 'Are you with us or what?' campaign <<http://docs.justia.com/cases/federal/district-courts/texas/txndce/3:2007cv01767/171558/22/>>.

<sup>234</sup> *Ibid.*

to Virgin as a matter of law, and on what basis, has not, as discussed in the preceding Chapter, been authoritatively determined. However, assuming it is unlikely that Alison would be able to establish that it was foreseeable that a person of normal fortitude would suffer a recognised psychiatric injury or illness as a result of the use of their image in this way, even imputed intent to cause harm is unlikely to be made out.<sup>235</sup>

For similar reasons, Alison is likely to have little success with an action for negligent infliction of harm. Although she will not need to establish an actual intention to cause harm, the infliction of a recognised psychiatric injury or illness on a person of normal fortitude will need, at the very least, to be considered a reasonably foreseeable consequence of the unauthorised use of her image.<sup>236</sup> Furthermore, where a duty of care on the part of Virgin can be established, a negligence action will only succeed if the unauthorised use of photographs in an advertising campaign would be considered unreasonable, such that the duty of care is breached.<sup>237</sup> It may be that a court would decide that using the photograph without the image subject's permission was not unreasonable, particularly where, as in this case, 'neither the name, nationality or [sic] residence of the photographed individual nor the location where the photograph was taken are clear from the image itself.'<sup>238</sup> On the other hand, if Virgin could have contacted Alison via the photographer (to whom the photograph was attributed) a failure to take steps to do so, or attempt to do so, may be unreasonable.

#### *(f) Information Privacy Legislation*

The *Privacy Act* applies to Virgin Mobile Australia, given that the organisation is incorporated in Australia and meets the definition of an organisation under the Act.<sup>239</sup> Virgin also has its own privacy policy.<sup>240</sup>

The photograph of Alison is likely to be considered 'personal information' as that term is defined in the *Privacy Act*: namely 'information or an opinion ... about an identified or reasonably identifiable individual'.<sup>241</sup> Although Alison is not identified in the photograph,

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<sup>235</sup> Referring to Spigelman CJ's observations in *Naidu* (2007) 71 NSWLR 471 [76] that 'something substantially more certain' than the reasonable foreseeability of psychiatric injury was required to satisfy the requirement that the defendant's act was 'calculated' to produce some effect of the kind that was produced that was produced.'

<sup>236</sup> See Chapter Three, Part Three (Negligent Infliction of Harm) 133-134.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Chang* (19 October 2007), Dallas 3:2007cv01767 (Tex. Dist. Ct.) Memorandum Opinion and Order, 15.

<sup>239</sup> *Privacy Act* s 6(1).

<sup>240</sup> Virgin Mobile, *Privacy* (6 March 2014) <<http://www.virginmobile.com.au/privacy/>>.

<sup>241</sup> *Privacy Act* s 6(1). At the time of Virgin's advertising campaign, however, an earlier version of the *Privacy Act* was in force. The definition of personal information under the *Privacy Act* as at 2007 was 'information or an opinion, whether true or not ... about an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion.' Under that definition it is arguable that the photograph of Alison would not constitute personal information because her identity is not apparent from and cannot be ascertained from the photograph. As noted by the trial judge 'neither the nationality or [sic] residence of the photographed individual nor the location where the photograph was taken are clear from the image

she might be considered reasonably identifiable by Virgin Mobile if they could have reasonably ascertained her identity by contacting the photographer, Justin Wong. Moreover, because the photograph is publically available it is likely to be considered personal information because members of the public have been able to identify her from it.<sup>242</sup> As such, Virgin would need to comply with the APPs relating to collection and receipt of information.<sup>243</sup> Virgin will be compliant with the APPs provided that its collection of Alison's personal information (that is, the photograph) was reasonably necessary for one or more of its functions or purposes<sup>244</sup> and that collection was undertaken by lawful and fair means.<sup>245</sup> Moreover, the information must have been collected directly from Alison *unless* it was unreasonable or impracticable to do so.<sup>246</sup> Virgin Mobile would be able to establish that the collection of the photograph was necessary for the purposes of its advertising campaign.<sup>247</sup> The collection of the photograph was also done lawfully, although whether it was done fairly is debateable. Given the purpose of the advertising campaign,<sup>248</sup> it is also arguably both unreasonable and impracticable to require Virgin to collect the information directly from the image subject: not least because the image subject does not own the copyright in the image.

Virgin may also need to comply with the APPs relating to use of and dealing with personal information. These APPs apply where an APP Entity 'holds' personal information which it does where it has possession or control of a record that contains the personal information.<sup>249</sup> However, the use of the photograph in an advertisement is unlikely in to

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itself': *Chang* (19 October 2007), Dallas 3:2007cv01767 (Tex. Dist. Ct.), Memorandum Opinion and Order, 15.

<sup>242</sup> In its guidelines on the Australian Privacy Principles, the OAIC notes that whether an individual is reasonably identifiable from particular information will depend on all the circumstances including, 'if the information is publically released, whether a reasonable member of the public who access that information would be able to identify the individual': OAIC, *Australian Privacy Principles Guidelines*, above n 71, 20 [B.91]. However, the OAIC has also stated that it believes this may not be the case unless the section of the public able to identify the person is sufficiently broad and that, for example, a photograph of someone's house is not personal information just because neighbours, family and friends are able to associate the house with a particular individual as this group is not sufficiently broad: Telephone Conversation with Carl, OAIC Enquiry Officer (2 September 2015).

<sup>243</sup> Although it should be noted that at the time the actual campaign ran in 2007, Virgin was subject to the National Privacy Principles under the previous version of the *Privacy Act*.

<sup>244</sup> *Privacy Act* sch 1, APP 3.2.

<sup>245</sup> *Ibid* APP 3.5.

<sup>246</sup> *Ibid* APP 3.6

<sup>247</sup> Virgin Mobile, *Are you with us or what?* (16 July 2007), Flickr <<http://www.flickr.com/groups/379879@N24/discuss/72157600858275458>> stating that the campaign in which Alison's photograph was used was 'part of an approach designed to reject clichéd advertising in favour of more genuine and spontaneous shots.'

<sup>248</sup> *Ibid*.

<sup>249</sup> *Privacy Act* s 6(1) – definition of 'holds'. A record, in turn, includes a document but does not include a generally available publication: s 6(1) – definition of 'record'. Although the photograph of Alison, having been available on the internet, would have been a generally available publication, once it was collected by Virgin it would have been held as a document or file that was not publically available. For that reason the APPs relating to the dealing with information will then apply to the information.

be a contravention of any of the APPs relating to the use of or dealing with personal information that is not sensitive information.<sup>250</sup>

In summary, even if Alison's photograph constitutes personal information, it is unlikely that the use of the photograph in the advertising campaign contravenes any of the APPs in relation to the collection and receipt of personal information or in relation to its use. There may be an argument that the personal information (that is, the photograph) was collected unfairly but, in any event, Alison would have no standing to bring an action for breach of the *Privacy Act* directly and would instead need to report her complaint to the OAIC, which may decide to investigate.<sup>251</sup>

*(g) Enhancing Online Safety for Children Legislation*

The photograph of Alison does not constitute cyberbullying material targeted at an Australian child and therefore Alison has no grounds of complaint to the e-Safety Commissioner regarding the use of her photograph.

*(h) Contract/Internet Content Regulation/Industry Regulation*

The Australian Association of National Advertisers ('AANA') has established a system of self-regulation that is centred upon voluntary compliance by those within the advertising industry with a set of codes and industry initiatives.<sup>252</sup> The system of self-regulation is not underpinned by any legislation.<sup>253</sup>

AANA administers a number of codes of ethics. Where a member of the public believes that the content of an advertisement or marketing communication contravenes any provision of the relevant codes, they can complain to the Advertising Standards Bureau, which may pass the complaint on to the Advertising Standards Board for determination.<sup>254</sup> Although determinations are not binding, the compliance rate in 2015 was 99%.<sup>255</sup>

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<sup>250</sup> Use of personal information for a purpose other than a primary purpose is subject to certain conditions: *Privacy Act* sch 1, APP 6. However, in this case the primary purpose of collection was for use in the advertising campaign so the privacy principle has not here been contravened.

<sup>251</sup> *Austen v Civil Aviation Authority* (1994) 50 FCR 272, 278. It should also be noted that organisations bound by the *Privacy Act* are required to contain information regarding how complaints about a breach of the Australian Privacy Principles (or a registered privacy code) should be made and how such complaints will be dealt with: *Privacy Act* sch 1, APP 1.4(3). Facebook's privacy code (also referred to as the data use policy) does inform users of the place to which questions concerning the data use policy should be addressed, but there is no information in the code about how complaints are dealt with: Facebook, *Data Policy* (29 September 2016) <<https://www.facebook.com/policy.php>>.

<sup>252</sup> Advertising Standards Bureau, *About: Self-Regulation* (8 September 2015) <<https://adstandards.com.au/about/self-regulation>>.

<sup>253</sup> *Ibid.*

<sup>254</sup> Advertising Standards Bureau, *Complaints the ASB Considers* (8 September 2015) <<https://adstandards.com.au/complaint-process/complaints-asb-considers>>.

<sup>255</sup> Advertising Standards Bureau, 'Irk, Eek, Oh! & Really? 40 Years: Self-Regulation Meeting Community Standards in Advertising' (2015) 33.



AANA also develops practice guidelines in relation to certain aspects of advertising and marketing practice. These guidelines do not actually form part of any of the AANA codes of ethics, but are designed to 'sit alongside' such codes.<sup>256</sup> One such guideline relates to the use of images of children and young people. A key component of the best practice approach outlined in that guideline is that children and young people have a right to decide whether their image is to be taken and how that image is used. However, the guidelines further state that consent is not required where images have been 'captured incidentally' or where the child or young person was not employed by or on behalf of the advertisers or marketers.<sup>257</sup> The guidelines also state that advertisers and marketers must take steps to ensure that a child or young person is 'always portrayed in a dignified and respectful manner'.<sup>258</sup>

The provisions of the best practice guideline on the use of images of children referred to above do not form part of (and are not directly reflected in) any of the AANA codes of practice. As such, even if these guidelines are not followed, it is unlikely that a complaint could be made directly to Advertising Standards Bureau. However, if a complaint were to be passed to the Advertising Standards Board for determination, it is not clear that there has been any contravention of the relevant guidelines. In this case, the photograph of Alison was taken incidentally and Alison was not employed by Virgin. There is an argument that the photograph with the accompanying text does not portray Alison in a dignified and respectful manner, but this is debateable. There is no record of a complaint being made to the Advertising Standards Bureau about the image of Alison Chang.

*(i) Summary of the Legal Position for Case Study Three*

In summary Alison is unlikely to have any grounds upon which to bring legal action for the use of her photograph in the Virgin campaign. In terms of an action for invasion of privacy at common law (should such an action be recognised) Alison is unlikely to be able to establish the threshold requirement of a reasonable expectation of privacy. The fact that Alison is distressed and humiliated by the use of her photograph is legally irrelevant in establishing either a privacy-based action or an action for breach of confidence or defamation. Furthermore, if Alison has experienced distress and humiliation short of a recognised psychiatric illness, an action for intentional or negligent infliction of harm or harassment is also unavailable. Although Alison's image has been used in a commercial context, any misleading or deceptive representation arising from the photograph is unlikely to be considered 'commercially relevant', in which case the action would not succeed. Alison may have grounds to argue that Virgin is in breach of the APPs relating to collection of personal information under the *Privacy Act*, on the basis that collection of

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<sup>256</sup> Australian Association of National Advertisers, 'AANA Code of Advertising and Marketing Communications to Children: Explanatory Note' (2014) 1.

<sup>257</sup> Australian Association of National Advertisers, 'Practice Guideline: Managing Images of Children and Young People' (2009) 2 (Consent).

<sup>258</sup> Ibid (Dignity).

her personal information was not undertaken by fair means. In this case, Alison would need to address her complaint to the regulator, the OAIC. It is unlikely that any other contravention of the APPs has occurred. The image is not within the purview of the *Online Safety Act* and is also unlikely to ground a complaint to the Advertising Standards Bureau.

## D Case Study Four (*Shabeeha*)

### 1 Scenario

Shabeeha is 16 and in Year 11 at High School. She is a quiet, studious girl with a close group of friends. On arriving at school one Monday morning Shabeeha is immediately bombarded by her friends asking her why she didn't tell them she was going to Jodi's party, to which none of the others in the group had been invited, and how she had managed to 'score' with a Year 12 student, Matt. Shabeeha tells her friends she has no idea what they are talking about: they explain that they saw the photo of her and Matt at the party because it is 'all over Facebook'. When Shabeeha checks her Facebook profile she is shocked to see that she has been tagged in a photograph with Matt, who appears to have his arm around her. The caption attached to the photo reads 'Hot new item! Shabeeha and Matt at Jodi's 17<sup>th</sup>'. Shabeeha did not attend the party, has never had a boyfriend and is from a very strict Muslim family: the photograph is a clever composite image that uses part of a photograph of Shabeeha taken from a school sports event, which is posted on the school's website. To anyone who doesn't know better, the picture of Shabeeha with Matt appears authentic. Shabeeha is worried that her parents will find out about the photograph and think that Shabeeha has been seeing a boy behind their back, has been allowing a boy to touch her, and has been attending parties without their permission. She is also worried about how the wider Muslim community of which she is a part would react. The photograph was originally posted by friends of Matt (as a prank directed at Matt).

### 2 Background and Key Features

This is a hypothetical scenario but based on a number of real-life examples of doctored photographs being created and posted online.<sup>259</sup> The manipulation of photographs has been discussed in the context of research on cyberbullying. For example, Kowalski et al refer to a case of denigration whereby a photograph of a schoolgirl that was designed to make her look pregnant was posted online.<sup>260</sup> Kowalski et al also refer to a case of a young

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<sup>259</sup> See, eg, Jake Sturmer and Alison Branley, 'Noelle Martin Fights to Have Harmless Selfie Removed from 'Parasite Porn Sites'', *ABC News* (Online), 12 October 2016 <<http://www.abc.net.au/news/2016-10-12/womans-fight-to-have-harmless-selfie-removed-from-porn-site/7924948>>; Daniel Bates, 'The Schoolgirls Arrested "for Cyberbullying Their Former Friend With a Fake Facebook Page"', *Daily Mail Australian* (online), 15 January 2011, <<http://www.dailymail.co.uk/news/article-1347034/Facebook-cyberbullying-Schoolgirls-arrested-creating-fake-page-naked-pictures.html>>. See also thread: FreeAdvice, *Is it Illegal to Superimpose a Face of a Minor onto a Picture of a Naked Body?* 2 June, 2010 <<http://forum.freeadvice.com/juvenile-law-90/illegal-superimpose-face-minor-onto-picture-naked-body-519300.html>>.

<sup>260</sup> Robin M Kowalski, Susan P Limber and Patricia W Agatston, *Cyberbullying: Bullying in the Digital Age* (Blackwell Publishing, 2<sup>nd</sup> ed, 2012) 48.

man who, angry at being left by his girlfriend, created a picture whereby his ex-girlfriend's head was superimposed onto her body.<sup>261</sup> The JSCCS report of 2011 relays the following from a 16-year-old girl:

Strangers went out of their way to insult a girl repeatedly on the social networking site, Tumblr. Manipulating photos of her using photoshop and making them embarrassing and humiliating for the girl.<sup>262</sup>

Software is readily available over the internet to enable individuals to create fake photographs and manipulate images.<sup>263</sup>

A key feature of this scenario is that the original photograph of Shabeeha was originally posted online, probably with her consent,<sup>264</sup> and its use on the school website was not problematic. However, it is the subsequent manipulation and republication ('re-contextualisation') of this image that causes Shabeeha distress and concern — although it is unclear from the scenario whether the composite photograph of Shabeeha and Matt causes concern for Matt. While Matt did not consent to his image being used in this way, it is possible that Matt will regard the composite image as it was intended, that is, as a joke. Alternatively, Matt could also be embarrassed or concerned by the use of the image in this way.

Another key feature of the scenario is that the composite photograph of Shabeeha and Matt has been created so that the information conveyed by the photograph is not factual — Matt has never had his arm around Shabeeha. The photograph, in conjunction with the text, also conveys untrue information: namely that Shabeeha attended Jodi's birthday party, when she did not.

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<sup>261</sup> Ibid 11.

<sup>262</sup> JSCCS, Parliament of Australia, *High Wire Act: Cyber-Safety and the Young*, Interim report (June 2011), 80.

<sup>263</sup> See, eg, FalseFlesh.Com, <<http://ww43.falseflesh.com/>>; Gimp, <<https://www.gimp.org/>>.

<sup>264</sup> The scenario does not tell us whether Shabeeha is from a public or private school: this is relevant as only private schools are generally bound by the *Privacy Act*, whereas public schools, being state government bodies, are bound by any applicable state privacy laws, which differ between jurisdictions. However, in each state the Department of Education generally requires public schools to gain express permission of a parent or parents or guardian to publish an image of a school pupil online: see, eg, Department of Education, The Government of Western Australia, *Permission to Publish Students' Work or Images on Websites*, last updated 21 December 2009 <<http://www.det.wa.edu.au/policies/detcms/policy-planning-and-accountability/policies-framework/forms/permission-to-publish-students-work-or-images-of-student-on-web-sites.en>>. In practice, private schools also likely require permission from parents and children before making an image of a schoolchild publically available, although different schools have different means of gaining consent. For example, some private schools seek a blanket consent at the time of enrolment, whereas others may seek express consent each time a new image is intended to be used.

### 3 Discussion of the Law

#### (a) Action for Invasion of Privacy

The manipulation of an image to communicate something about Shabeeha (and Matt) that is not factual amounts to the presentation of a person in a false light. In *Lenah*, Gummow and Hayne JJ suggested that the presentation of a person in a false light may not properly concern a privacy interest and commented that '[t]o place the plaintiff in a false light may be objectionable because it lowers the reputation of the plaintiff or causes financial loss or both.'<sup>265</sup> This is a view shared by Raymond Wacks who has written that the false light category 'seems to be both redundant (for almost all such cases might equally have been brought for defamation) and only tenuously related to the protection of the plaintiff against aspects of his or her private life being exposed.'<sup>266</sup> In this case, however, and as discussed below, a claim for defamation is unlikely to succeed. Therefore, the fact that Shabeeha has been presented in a false light is unlikely, in itself, to give rise to a reasonable expectation of privacy vis-a-vis publication of the image. Instead, Shabeeha would need to establish that she had an expectation of privacy in relation to publication of the image. This could be argued on the basis that it is the manipulation and *publication* of the image — rather than any underlying information conveyed by it — that constitutes an invasion of Shabeeha's privacy.<sup>267</sup> Applying Gleeson CJ's test in *Lenah*, that a useful practical test of whether information is private is 'the requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities',<sup>268</sup> it could be argued that disclosure of the photograph was highly offensive, when judged from the perspective of a reasonable person in Shabeeha's position — namely, a person who is, like Shabeeha, from a strict Muslim background.<sup>269</sup>

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<sup>265</sup> *Lenah* (2001) 208 CLR 199, 256 [125].

<sup>266</sup> Raymond Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013) 181, cited by ALRC, *Serious Invasions of Privacy*, above n39, 88 [5.71].

<sup>267</sup> As the photograph of Shabeeha used to create the composite image was taken while Shabeeha was participating in a school sports event, neither the capture of the photograph nor its subsequent use involved an intrusion upon Shabeeha's seclusion.

<sup>268</sup> *Lenah* (2001) 208 CLR 199, 226 [42]. Referring to the paragraph of Gleeson CJ's judgment in *Lenah* from which the quote is taken, Lord Hope in *Campbell* stated that it was important to bear in mind the source of the offensiveness test 'and the guidance which the source offers as to whether the information is public or private'. Lord Hope then referred to the relevant source, being the US *Restatement of the Law of Torts (Second)* 1977 §652D and observed that the reference to the person of ordinary sensibilities was, as acknowledged by Gleeson CJ, a quotation from Dean Prosser who stated that 'the matter made public must be one which would be offensive and objectionable to a reasonable man, who must expect some reporting of his daily activities': *Campbell* [2004] 2 All ER 995, 1020 [94] (references omitted).

<sup>269</sup> Although there is some uncertainty as to the extent to which a person's particular background should be taken into account when applying the offensiveness test. In the context of recommending a statutory cause of action for invasion of privacy, the ALRC has advised that courts take into account various factors in determining whether a person in the plaintiff's position would have a reasonable expectation of privacy — these include the attributes of the actual plaintiff: ALRC, *Serious Invasions of Privacy*, above n 39, 92 [6.8]. To this end, it has been noted that 'the culture and background of the plaintiff may also be relevant to whether they have a reasonable expectation of privacy. Some information may be considered to be more private in some cultures than in others': ALRC, *Serious Invasions of Privacy*, above n 39, at 104 [6.70]. In its submission to the NSW Standing Committee on Law and Justice inquiry into Remedies for Serious Invasions

By reference to that test, the publication of a doctored photograph of Shabeeha might be considered sufficiently offensive so as to give rise to a reasonable expectation of privacy. On the other hand, if the truth of the information is an element of any common law action then Shabeeha has no chance of success.<sup>270</sup> Moreover, if those who composed and posted the image were not aware of Shabeeha's background (this is unclear from the case study), it might be more difficult to conclude that Shabeeha had an expectation of privacy vis-à-vis publication of an image by reference to the offensiveness test. Related to this is the question of the type of fault or intent that the defendant must possess in order to ground the action. As discussed above, it is unclear whether the fault element would require Shabeeha to establish that the invasion of her privacy was 'wilful',<sup>271</sup> or negligent,<sup>272</sup> or whether it could be imputed to the person or persons who doctored the image on the basis that a reasonable person would know that intrusion, misuse or disclosure, were obviously or substantially likely to follow, when objectively assessed.<sup>273</sup> Unless those who doctored and posted the image online were aware of Shabeeha's strict background, it is possible that Shabeeha would not be able to establish the necessary intention.

If detriment is an element of the action for invasion of privacy at common law, it is not clear from the facts provided whether Shabeeha would be able to establish that she suffered mental, physiological or emotional harm or distress.<sup>274</sup>

Shabeeha would need to establish that her privacy interest outweighed other public interests, including freedom of expression. This may prove difficult. Although the individuals who composed the image of Shabeeha and Matt and posted it online were doing this as a prank directed at Matt, rather than as an exercise in artistic expression per se, the fact remains that expression in this form is still expression. Absent malice on the part of those individuals, it is likely that the public interest in free expression could be considered to outweigh Shabeeha's interest in being protected against the unwanted publication of her image. On the other hand, the court may have regard to the public interest in protecting Shabeeha's free expression — so that, for example, the failure to

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of Privacy in NSW, Women's Legal Services of NSW noted that 'an image of a woman without her religious headscarf can cause harm to a victim if they are shared or threatened to be shared without consent' and urged the Standing Committee to 'give these forms of invasions of privacy serious consideration and to recognise the serious impact sharing images such as these could have on the victim': Women's Legal Services NSW, Submission No 32 to NSW Standing Committee on Law and Justice, *Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales*, 29 September 2015, 5 [11]. Similarly, there would be a serious impact on Shabeeha in relation to the sharing of the image such as that described in the case study.

<sup>270</sup> The majority of the New Zealand Court of Appeal in *Hosking* 1 NZLR 1, [117] (Gault P and Blanchard J) considered that truth was essential in that a fundamental requirement of the tort was stated as being: 'The existence of facts in respect of which there is a reasonable expectation of privacy'; in Australia the position has not been clarified, although in the context of recommending the form of a statutory cause of action for invasion of privacy the ALRC has made it clear that the action should encompass untrue information, provided that the information would be private if it were true.

<sup>271</sup> See *Grosse* (2003) Aus Torts Reports ¶81-706, 64,187 [444] (Skoien DCJ).

<sup>272</sup> See *Doe v ABC* [2007] VCC 281 (3 April 2007) 52, 159 (Hampel J).

<sup>273</sup> ALRC, *Serious Invasions of Privacy*, above n39, 110 [7.7].

<sup>274</sup> See *Grosse* (2003) Aus Torts Reports ¶81-706, 64,187 [444] (Skoien DCJ).

provide a remedy might have a chilling effect on Shabeeha's willingness to agree to being photographed in future, even at school events.<sup>275</sup>

On balance, Shabeeha would be unlikely to succeed in an action for invasion of privacy.

### *(b) Breach of Confidence*

The image of Shabeeha purports to reveal certain information about Shabeeha, although that information is untrue. It is possible that even untrue information will be regarded as confidential in certain circumstances, although the position in Australia on this point is not settled.<sup>276</sup>

Even if untrue information is capable of being regarded as confidential, the information would need to possess a quality of confidence which means that, among other things, it must be regarded as non-trivial. In the case of Shabeeha, it is likely that the information conveyed by the image would, in any event, be regarded as trivial.

If Shabeeha were to succeed in establishing that the image conveyed confidential information (which is unlikely) she would still need to establish that the person or persons posting the image online were under an obligation of confidence to her. As there is no pre-existing relationship of confidence, this would depend on establishing that obligation arose due to the nature of the information or possibly because the way in which the information was obtained (created) was improper. The information in question is not 'obviously' private and it is unclear that the doctoring of a photograph, occurring by way of a prank, would be considered 'improper'. Therefore it is unlikely that Shabeeha would succeed in establishing an obligation of confidence on the part of those posting the image. It is possible that a court would be persuaded to impose an obligation of confidence where a person has a reasonable expectation of privacy in relation to publication of the information but in any event, and as discussed above, it will be difficult for Shabeeha to establish this.

An action for breach of confidence is not likely to succeed.

### *(c) Defamation*

It has been said that situations in which a person is portrayed in a false light are more appropriately left to be dealt with by the law of defamation rather than laws protecting privacy.<sup>277</sup> However, a remedy in defamation is only available if the person bringing the action can establish that the image conveys imputations that are capable of being defamatory, and which are in fact defamatory of that person (and not true). The photograph of Shabeeha purports to convey information about Shabeeha (where she was and who she was with) but this information is unlikely to have a defamatory capacity as it

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<sup>275</sup> This is discussed further in Chapter Five.

<sup>276</sup> See Chapter Three, Part Three (Breach of Confidence) 114.

<sup>277</sup> ALRC, *For Your Information*, above n 9, 2566 [74.120].

conveys nothing that would cause an ordinary reasonable person to think less of Shabeeha, shun and avoid her, or ridicule her. Although Shabeeha is worried about the reaction of her strict Muslim family and community, the defamatory capacity will probably not be judged by reference to sectional attitudes.<sup>278</sup> As such, Shabeeha will not have recourse to defamation.

*(d) Intentional or Negligent Infliction of Harm or Harassment*

Unless Shabeeha suffers a recognised psychiatric illness as a result of the doctored photograph, an action for intentional or negligent infliction of harm or harassment is not open to her. In any event, it would be necessary to establish, for the purposes of such an action, that the person who doctored and posted the photograph actually intended to cause Shabeeha harm or (possibly) that intention can be imputed to them.<sup>279</sup> Because the photograph was not meant to target or harm Shabeeha, but was meant as a ‘prank’ directed at Matt, actual intention cannot be established. It is also unlikely that Shabeeha can establish that it was foreseeable that a person of normal fortitude would suffer a recognised psychiatric injury or illness (although there may be some room for argument here if the individuals who doctored the photograph specifically knew of Shabeeha’s family and cultural background and the likely reaction of her parents or her wider Muslim community to the information conveyed by the photograph and caption).<sup>280</sup> As such, imputed intention for the purpose of an action for intentional infliction of harm is also unlikely to be made out,<sup>281</sup> and for the same reason an action for negligent infliction of harm will also fail.

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<sup>278</sup> Mendelson writes that, ‘in *Radio 2UE Sydney Pty Ltd v Chesterton* the High Court held that the “ordinary reasonable person” test would apply in all defamation cases involving all aspects of reputation. The fact that the defamatory matter might have caused particular harm to the plaintiff due to his or her social, religious or ethnic affiliations will only be relevant to the question of damages assessment’: Danuta Mendelson, *The New Law of Torts* (Oxford University Press, 2<sup>nd</sup> edition) 777, citing *Radio 2UE* [2009] HCA 16, [36], [40]–[41] (Gummow, Kiefel and Bell JJ).

<sup>279</sup> See Chapter Three, Part Three (Intentional Infliction of Harm) 133-134.

<sup>280</sup> In those jurisdictions with civil liability legislation stipulating a ‘normal fortitude’ test in relation to mental harm, the existence of a pre-existing relationship between the plaintiff and defendant is a relevant consideration in determining whether it was foreseeable that mental harm would be suffered by the plaintiff: *Civil Liability Act 2002* (WA) s 5S(1); relevant circumstances to be taken into account in other jurisdictions are set out in *Civil Law (Wrongs) Act 2002* (ACT) s 34(2); *Civil Liability Act 2002* (NSW) s 32(2); *Civil Liability Act 1936* (SA) s 33(2); *Civil Liability Act 2002* (Tas) s 34(2); *Wrongs Act 1958* (Vic) s 72(2). Where the common law position has not been altered by statute, actual knowledge of the plaintiff’s situation will also affect the question of foreseeability: see Chapter Three, Part Three (Negligent Infliction of Harm) 134-136.

<sup>281</sup> It was noted in *Naidu* (2007) 71 NSWLR 471 [76] (Spigelman CJ) that imputed intention, in any event, depends on something ‘substantially more certain’ than reasonable foreseeability of psychiatric injury.

### *(e) Information Privacy Legislation*

The *Privacy Act* does not apply to the acts or practices of individuals<sup>282</sup> and will not therefore apply to the person or persons who doctored and uploaded Shabeeha's photograph to the internet.

As is the case with Tim (Case Study Two) there is a question as to whether the *Privacy Act* applies to Facebook at all.<sup>283</sup> Even if the Act does apply and the photograph is considered 'personal information' in relation to Shabeeha, it is unlikely that the collection or receipt of Shabeeha's photograph will breach the APPs. Unlike the situation with Tim, however, it could be more difficult for Facebook to show that the collection or receipt of information about Shabeeha (in the form of doctored photographs) was reasonably necessary for one or more of its functions and purposes, given that the purpose of the site is to allow users to exchange personal information about themselves and others, rather than to exchange false or misleading information (indeed, posting misleading information is a breach of Facebook's own terms and conditions).<sup>284</sup> The photograph of Shabeeha may be considered sensitive information on the basis that it constitutes 'biometric information',<sup>285</sup> in which case her consent is required to collection (or receipt) of the information. However, as Shabeeha has a Facebook account, she may be taken to have agreed to the collection of her information by Facebook due to having agreed to their terms or service upon signing up as a Facebook member, although this is arguable.<sup>286</sup> Practically, it might be difficult for Shabeeha to demonstrate to Facebook that the image had been doctored. However, if she was able to do this and Facebook refused to remove the image within a reasonable time of receipt of a request from her, she could complain to the OAIC, which might decide to investigate.<sup>287</sup>

### *(f) Enhancing Online Safety for Children Legislation*

It is unlikely that the photograph of Shabeeha would be considered 'cyberbullying material targeted at an Australian child' under the *Online Safety Act*. The photograph was posted online by friends of Matt, as a prank directed at Matt. As such, a reasonable person would be unlikely to conclude that the image was intended to have any effect on Shabeeha herself, as opposed to Matt. In terms of whether the image is likely to be considered seriously humiliating (or seriously threatening, intimidating or harassing) within the meaning of the Act, the e-Safety Commissioner has noted that the background of the child and their particular circumstances and vulnerabilities as well as the material

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<sup>282</sup> *Privacy Act* s 7B(1).

<sup>283</sup> See sources discussing this point at above n 158.

<sup>284</sup> APP 3 requires an organisation to collect personal information (other than sensitive information) only where it is reasonably necessary for one or more of the organisation's purposes: *Privacy Act* sch 1, APP 3.2.

<sup>285</sup> For a discussion of when photographs are also biometric information, see Chapter Three, Part Three (Information Privacy Laws) 148-149 and Bunn, above n 67, 55-7.

<sup>286</sup> See discussion on this point in relation to Case Study Two (Tim) above and see further, *ibid* 59-61.

<sup>287</sup> As noted above, individuals have no standing to bring an action for breach of an APP directly – see *Austen v Civil Aviation Authority* (1994) 50 FCR 272, 278 above n 76



itself, including its sensitivity, will be taken into account. Even so, while the photograph causes Shabeeha to be concerned about the reaction of her family and immediate community that does not mean the photograph is, when judged objectively, likely to be considered seriously humiliating (or seriously threatening, intimidating or harassing).<sup>288</sup>

*(g) Contract/Internet Content Regulation/Industry Regulation*

The doctored photograph of Shabeeha has been uploaded to Facebook. As the photograph and text suggests that Shabeeha was in a place she was not and with a person she was not with, it is misleading and as such will breach one of Facebook's own terms of use.<sup>289</sup> Posting of the photograph of Shabeeha without her permission may also infringe the Facebook community standards.<sup>290</sup> Shabeeha herself has a contract with Facebook by virtue of being an account holder. Even so, and as discussed in Chapter Three, Facebook is under no obligation to her (or others, regardless of whether or not those others have a contract with the social media provider) to remove content that breaches its terms and conditions. Indeed, Facebook reminds users in the 'Reporting Abuse' section to 'keep in mind that reporting a piece of content does not guarantee that it will be removed from the site.'<sup>291</sup> Facebook does, of course, have discretion to remove content that violates its terms.<sup>292</sup>

*(h) Summary of the Legal Position for Case Study Four*

Shabeeha probably has no direct legal cause of action in relation to the image that has been created and posted, even though the existence of the image causes her distress, and causes her to fear that her parents will think she has been lying to them or has acted improperly. Even if an action for invasion of privacy is available at common law, Shabeeha is unlikely to satisfy the threshold requirement that she had a reasonable expectation of privacy in relation to the publication of the image. This is because, although the image presents her in a false light, it was not captured in circumstances involving an intrusion into a private space, nor does it convey private information. Moreover, the fact that the information conveyed by the photograph is false could also be fatal to the action. Even if Shabeeha could demonstrate a reasonable expectation of privacy, it could be difficult to establish requisite intent on the part of those creating and posting the image and, in any event, public interest in protecting freedom of expression could be considered to override her privacy interest. An action for breach of confidence is probably unavailable given that

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<sup>288</sup> *Online Safety Act* s 5.

<sup>289</sup> Facebook, *Statement of Rights and Responsibilities* (30 January 2015) <<https://www.facebook.com/legal/terms>>, term 3 (9), which provides that users will not use the site to do anything 'unlawful, misleading, malicious, or discriminatory'.

<sup>290</sup> Facebook, *Community Standards* (2 September 2015) <[www.facebook.com/communitystandards](http://www.facebook.com/communitystandards)> (Keeping Your Account and Personal Information Secure) which state that users 'may not publish the personal information of others without their consent'

<sup>291</sup> *Ibid* (Reporting Abuse).

<sup>292</sup> Facebook, *Statement of Rights and Responsibilities* (30 January 2015) <<https://www.facebook.com/legal/terms>> term 14 (termination).

the information will not possess the necessary quality of confidence, and an action for defamation would also fail because the image communicates no defamatory imputations about Shabeeha. Even if Shabeeha has suffered a recognised psychiatric illness as a result of the publication of the photograph, actions for intentional or negligent infliction of harm or harassment would also fail on the element of intent or fault.

Shabeeha could certainly request Facebook to remove the image, but given the nature of the image it is unlikely that this request would be met, even if she was able to demonstrate it had been doctored. The rapid removal scheme established by the *Online Safety Act* will not assist Shabeeha here, either, as the image would not fall within the definition of ‘cyberbullying material targeted at an Australian child’. There is a possibility that Shabeeha could complain to the OAIC, on the basis that Facebook’s collection (or receipt) of the image was not reasonably necessary for one or more of its purposes. It is by no means clear that the OAIC would choose to (or would have standing to) investigate. Finally, although the image appears to contravene Facebook’s own terms and conditions, there is no obligation on the part of that organisation to remove the material from the site.

## E Case Study Five (*Tyger and Lilly*)

### 1 Scenario

Tyger and Lilly are six and two respectively when they are photographed by their parents in the living room of their own home. Tyger is wearing only his underpants and Lilly is still in a diaper. Tyger and Lilly’s mother uploads the photograph to her Facebook page, the privacy setting of which is ‘public’.<sup>293</sup> At the time the photograph is published neither of the children are aware of its existence or publication. However, two years after the photograph is uploaded to Facebook, it is subsequently discovered by an online news service running a story about obese children and the dangers of ‘junk food’. The news service publishes the photograph, acknowledging the source (although not the names of the children), on their website along with the caption ‘Even very young children are addicted to junk food’. Soon after the photograph appears it comes to the attention of some of the children at Tyger’s school who begin to tease him about being a ‘junk food addict’ and call him ‘fatty’.

### 2 Background and Key Features

This scenario is hypothetical; however, it was created around a photograph found on a publicly accessible website that came up on ‘Google images’ after searching under the term ‘obese children’.<sup>294</sup> The photograph has been used to illustrate a news story entitled

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<sup>293</sup> Facebook users have various privacy settings available to them for different aspects of their Facebook pages, such as contact information and images: these include ‘public’ and ‘friends’: Facebook, *Basic Privacy Settings and Tools*, Facebook Help Centre < <https://www.facebook.com/help/325807937506242/>>.

<sup>294</sup> Douglas Robb, ‘Does Baby Fat = Adult Fat?’ *Hive Health Media* (4 January 2011) <https://www.hivehealthmedia.com/baby-fat-adult-fat/>.

‘Overweight kids face bias from own moms, dads’, although neither of the children were named.<sup>295</sup> The photograph has also been used to illustrate at least three other stories.<sup>296</sup>

Recently it has been reported that a young Austrian woman is bringing an action for invasion of privacy against her parents in relation to the publication on Facebook of numerous images of her, as a child. The woman is quoted as saying: ‘They knew no shame and no limits. They didn’t care if I was sitting on the toilet or lying naked in the cot, every moment was photographed and made public.’<sup>297</sup> This case study bears some similarities to the facts of a US case, *Faloona v Hustler Magazine, Inc.*,<sup>298</sup> which involved, inter alia, a claim for invasion of privacy. In *Faloona* a mother brought an action based on invasion of privacy, as well as an action seeking to void a photographic release, in respect of the publication in *Hustler* magazine of nude photographs of her and her two children. The photographs in question had been taken with the permission of the mother who had signed a photographic release in respect of the images, which had then been published in two books: ‘The Sex Atlas’ and ‘Meditations of the Gift of Sexuality’.<sup>299</sup> *Hustler* magazine published a book review of *Meditations* and included with that review one of the nude photographs that had appeared of the mother and children. *Hustler* also published, in a subsequent edition, an excerpt of ‘The Sex Atlas’ along with a photograph of the children.<sup>300</sup>

A key feature of this case study is that, unlike the case study involving Tim (Case Study Two) the children who are the subjects of this photograph were comfortable with the photograph being taken (indeed they posed for it).

Other key features are that only one of the children (Tyger) is aware of the publication and use of the image by the news service and the photograph is initially published on the internet by the children’s own mother. This latter fact affects questions of consent. Unlike the Austrian woman reportedly suing her parents for invasion of privacy, the issue here is not so much the publication of the image on the mother’s Facebook page but its subsequent use (or ‘re-contextualisation’).

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<sup>295</sup> ‘Overweight kids face bias from own moms and dads’, *The Hive Daily* (online), 23 September 2010 < <http://thehivedaily.com/blog/2010/09/23/overweight-kids-face-bias-from-own-moms-dads/>>. The author is not aware of the identity of the children or the origins of the photograph in question.

<sup>296</sup> Marina Dimova, ‘Overweight children have more complications with anaesthesia’, *Visit Bulgaria* (17 November 2008) < <http://visitbulgaria.info/overweight-children-have-more-complications-anaesthesia>>; Cary Castagna, ‘Wanted: Fat Kids’, *Keeping Fit, Edmonton Sun* (online), 18 June 2010; and Robb, above n **Error! Bookmark not defined.**

<sup>297</sup> Justin Huggler, ‘Austrian Teenager Sues Parents for ‘Violating Privacy’ with Childhood Facebook Pictures’, *The Telegraph* (Online), 16 September 2016 < <http://www.telegraph.co.uk/news/2016/09/14/austrian-teenager-sues-parents-for-violating-privacy-with-childh/>>.

<sup>298</sup> 799 F.2d 1000 (5<sup>th</sup> Cir. 1986) (*Faloona*).

<sup>299</sup> *Ibid* [9]–[10] (Politz Circuit-Judge).

<sup>300</sup> *Ibid* [3]–[13] (Politz Circuit-Judge).

In considering the legal position arising from this scenario it is necessary to put aside the most obvious difficulty that presents here, which is that, given the age of the children, they would be unlikely to be aware of their right to take legal action (even assuming that a cause of action were available to them). Therefore, unless a parent wished to take action on behalf of the children there would, practically speaking, be very little that the children, or others on their behalf, could do.

### 3 *Discussion of the Law*

#### *(a) Action for Invasion of Privacy*

The image was not captured in circumstances involving an intrusion upon the children's seclusion because it was taken by the children's mother. Therefore, an action for invasion of privacy will be made out only if the children can establish a reasonable expectation of privacy in relation to the particular use of the image.. As such, the children will need to show that the image constitutes private information or that, in any event, the children had an expectation of privacy that the image would not be published. In determining whether Tyger and Lilly did have a reasonable expectation of privacy, one question that would need to be resolved is whose perspective that expectation is determined from? In particular, given that Lilly is so young, there is the question of whether and if so when a very young child can be said to have a reasonable expectation of privacy and whether a child whose parents have 'courted publicity' for the child can be said to have a reasonable expectation of privacy.<sup>301</sup> There is also a question of whether children may have an expectation of privacy in circumstances that an adult would not.

In relation to the first question, courts have grappled with the correct perspective to adopt where the claimant is a young child. In *Campbell*, Lord Hope emphasised that the perspective to be adopted in determining a reasonable expectation of privacy was that of the 'reasonable person of ordinary sensibilities' who was 'placed in the same position as the claimant and faced with the same publicity'.<sup>302</sup> Referring to Lord Hope's test, the trial judge in *Murray v Express Newspapers* commented as follows:

This test cannot, of course, be applied to a child of the Claimant's age who has no obvious sensitivity to any invasion of his privacy which does not involve some direct physical intrusion into his personal space. A literal application of Lord Hope's words would lead to the rejection of any claim by an infant unless it related to harassment of an extreme kind ... The question whether a child in any particular circumstances has a reasonable expectation for privacy must be determined by the Court taking an objective view of the matter including the reasonable expectations of his parents in those same circumstances as to whether their children's lives in a public place should remain private ... The Court can

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<sup>301</sup> Where image subjects are children of celebrities, there is also a question of the extent to which the child can be said to have an expectation of privacy distinct from that of their parents. That is discussed further below.

<sup>302</sup> *Campbell* [2004] 2 All ER 995, 1021 [99] (Lord Hope).

attribute to the child reasonable expectations about his private life based on matters such as how it has in fact been conducted by those responsible for his welfare and upbringing.<sup>303</sup>

The Court of Appeal in *Murray v Big Pictures* expressed their agreement with the judge's approach quoted above.<sup>304</sup> That approach was subsequently endorsed by the Supreme Court in *In re JR 38*<sup>305</sup> and by the Court of Appeal in *Weller*.<sup>306</sup> In the latter case, a newspaper had published photographs of the three children of Paul Weller, a well-known musician, during a family outing in California. In the UK, therefore, it seems well-established that the reasonable expectation of privacy test is objective but should nevertheless take account of the perspective of the plaintiff and other subjective factors such as the actual impact of publication on the plaintiff.<sup>307</sup> Given the objective nature of the test, a very young child may well have an expectation of privacy, although in any given case this will be a question of fact dependent on all the circumstances. If a cause of action for invasion of privacy is recognised by Australian courts, it is likely that the reasonable expectation of privacy test would be applied in a similar way.<sup>308</sup>

There is also the question of the extent to which the expectations of privacy on the part of children are distinct from the expectations of their parents. This question is illustrated in cases such as *Murray* and *Weller*, involving children of celebrity parents (the question being whether the child's expectations are 'likely to be diminished simply by the flow-on effects of their relationship with their celebrity parent')<sup>309</sup> and in situations such as this where images of young children have been posted to the internet by a parent. Hughes has described the decision of the Court of Appeal in *Murray* as 'disappointing' in that the 'court left open the possibility that a child's right to privacy may be waived by his or her parents'.<sup>310</sup> Nevertheless, this approach has been followed in subsequent cases. In *Weller*, the Court of Appeal, referring to the fact that young children generally do not choose to

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<sup>303</sup> [2007] EWHC 1980 (Ch) [23] (Patten J).

<sup>304</sup> [2008] EWCA Civ 446 [38] (Sir Anthony Clarke MR, Laws LJ and Thomas LJ) (*'Murray'*).

<sup>305</sup> *In re JR 38* [2015] UKSC 42 [88] (Lord Toulson).

<sup>306</sup> *Weller* [2015] EWCA Civ 1176, [36] (Lord Dyson MR, with Lords Justice Tomlinson and Bean in agreement).

<sup>307</sup> *Murray* [2008] EWCA Civ 446 [36] (Sir Anthony Clarke MR, Laws LJ and Thomas LJ); *Weller* [2015] EWCA Civ 1176, [36] (Lord Dyson, Master of the Rolls, with Lords Justice Tomlinson and Bean in agreement).

<sup>308</sup> To this end it is also worth noting that the ALRC, in its report *Serious Invasions of Privacy in the Digital Era*, favours the adoption of an objective test to determine whether a person has a reasonable expectation of privacy for the purpose of the statutory cause of action for invasion of privacy, in relation to which subjective expectations of the plaintiff would be relevant but not essential: 'The court must consider, not whether the plaintiff subjectively expected privacy, but whether it would be reasonable for a person in the position of the plaintiff to expect privacy. The subjective expectation of the plaintiff may be a relevant consideration, particularly if that expectation was made manifest, but it is not the focus of the test nor an essential element that must be satisfied': ALRC, *Serious Invasions of Privacy*, above n39, 92 [6.7].

<sup>309</sup> As stated by Randerson J in *Hosking v Runting* [2003] 3 NZLR 385 (30 May 2003) [142].

<sup>310</sup> Kirsty Hughes, 'The Child's Right to Privacy and Article 8 *European Convention on Human Rights*' in Michael Freeman (ed) *Law and Childhood Studies: Current Legal Issues* (Volume 14 2012, Oxford University Press) 456, 480.

be in a particular place or interact in a private or public way with other people, expressed the view that:

it is parents who usually exercise this decision-making for young children. Thus, if parents choose to bring a young child onto the red carpet at a premiere or awards night, it would be difficult to see how the child would have a reasonable expectation of privacy or article 8 would be engaged. In such circumstances, the parents have made a choice about the child's family life and the types of interactions that it will involve. A child's reasonable expectations of privacy must be seen in the light of the way in which his family life is conducted.<sup>311</sup>

It is relevant here to note that in the New Zealand case of *Hosking*, a case also involving the photographing of children of celebrity parents in a public place, the majority of the Court of Appeal supported the general proposition that a child's reasonable expectations of privacy would likely be 'diminished simply by the flow-on effects of their relationship with their celebrity parent'.<sup>312</sup>

Whether courts in Australia would follow this position remains to be seen if ever a common law cause of action for invasion of privacy is recognised. There is certainly an argument, however, that Tyger and Lilly's expectations of privacy vis-a-vis the use of their image have been diminished due to the mother's action in posting the image to a publically accessible Facebook page.

As to the question of whether children have an expectation of privacy in situations that an adult would not, Australian courts might look to the approach taken in other jurisdictions. One approach, outlined in the discussion relating to Case Study Two (Tim), suggests that in certain circumstances children may indeed be found to have an expectation of privacy when an adult might not. However, it is also possible that the opposite is true and that in some circumstances adults, or older children, may have an expectation of privacy when a younger child would not. In *Weller*, for example, a relevant factor in determining whether or not there is an expectation of privacy is the impact of publication on the image subject.<sup>313</sup> To this end, the court noted that '[a]n older child is likely to have a greater perception of his own privacy and his experience of an interference with it might well be more significant than for a younger child.'<sup>314</sup> In the Australian context, as also noted in Case Study Two (Tim), in recommending the form of a statutory cause of action for serious invasions of privacy, the ALRC set out a number of non-

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<sup>311</sup> *Weller* [2015] EWCA Civ 1176, [33] (Lord Dyson, Master of the Rolls, with Lords Justice Tomlinson and Bean in agreement).

<sup>312</sup> *Hosking* [2005] 1 NZLR 1, [123] and [124] (Gault P and Blanchard J). Tipping J seemed to conflate the child's expectations of privacy with those of their parents: 'I doubt whether many members of society would regard the Hoskings as having expectations of privacy in current circumstances in respect of their children' at [260].

<sup>313</sup> *Weller* [2015] EWCA Civ 1176, [31], [36] (Lord Dyson, Master of the Rolls, with Lords Justice Tomlinson and Bean in agreement).

<sup>314</sup> *Ibid* [31] (Lord Dyson, Master of the Rolls, with Lords Justice Tomlinson and Bean in agreement).

exhaustive factors to be taken into account in determining whether a plaintiff has a reasonable expectation of privacy. These also include the attributes of the plaintiff, one of which is the plaintiff's age.

It is possible therefore that a court would determine that Tyger and Lilly would have a reasonable expectation of privacy vis-a-vis use of the image even if an adult would not have an expectation of privacy in the same situation. Even if that is the case, however, it could well be fatal to establishing an expectation of privacy that the children's mother published the image on her publically accessible Facebook page.

On the assumption that Tyger and Lilly are able to establish an expectation of privacy in respect of the use of their image to illustrate the news website, it may also be necessary for the children to establish also that the invasion of privacy was serious or that publication was highly offensive to a person of ordinary sensibilities in their position. In relation to the application of the offensiveness test to images of children, the Court of Appeal of England and Wales found in *Murray* that the test had been wrongly applied in *Hosking*:

The approved test is not whether a person of ordinary sensibilities would find the publication highly offensive or objectionable, even bearing in mind that young children are involved, but (as Lord Hope put it ...) what a reasonable person of ordinary sensibilities would feel if he or she was placed in the same position as the claimant and faced with the same publicity. [Gault and Blanchard JJ] did not consider either of the two questions posed through the eyes of the reasonable child, or (more realistically) through the eyes of the reasonable parent on behalf of the child.<sup>315</sup>

It is likely that a *reasonable* parent would indeed find the use of the photograph to illustrate an obesity website offensive.

If detriment, in the form of mental, physiological or emotional harm or distress is an element of the common law action for invasion of privacy,<sup>316</sup> this would prevent Lilly from establishing the cause of action because she is not aware of the use of the photograph.

Even if the children are able to establish a reasonable expectation of privacy, for the purpose of a common law action they may need to establish intention or fault on the part of the news service. As already noted, it is unclear whether this would require the children to establish that the invasion of their privacy was 'wilful',<sup>317</sup> or negligent,<sup>318</sup> or whether it could be imputed to the news site on the basis that a reasonable person would know that intrusion, misuse or disclosure were obviously or substantially likely to follow.<sup>319</sup>

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<sup>315</sup> *Murray* [2008] EWCA Civ 446 [52] (Sir Anthony Clarke MR, Laws LJ and Thomas LJ).

<sup>316</sup> *Grosse* (2003) Aus Torts Reports ¶81-706, 64,187 [444] (Skoien DCJ).

<sup>317</sup> *Ibid* [444] (Skoien DCJ).

<sup>318</sup> See *Doe v ABC* [2007] VCC 281 (3 April 2007) 52, 159 (Hampel J).

<sup>319</sup> ALRC, *Serious Invasions of Privacy*, above n39, 110 [7.7].

A court would also need to be satisfied that there are no countervailing interests in freedom of expression sufficient to override the children's privacy interest. In this regard, freedom of information and of the press is a relevant consideration. However, use of Tyger and Lilly's image is not central to the information being communicated by the website — the information is about obesity in general and not about the children in particular. Moreover, the image would probably have been as effective if the faces of the children were pixelated so that the children could not be identified. In this case, particularly if the best interests of the children are considered, the balance is likely to come down in favour of the children's privacy interests.

There is an argument that the fact that the image was placed onto a publically accessible Facebook page by the children's mother was tantamount to consent to the use of the image by the news site. While the children themselves obviously have not consented, they are likely to be regarded, in any event, as too young to have capacity to consent and it would be for a parent or carer to make decisions around publication or use of images.<sup>320</sup> However, although the children's mother has clearly consented to the publication of the image on Facebook, she has presumably not expressly consented to the use of the image on the website about obese children. The question would therefore be whether consent can be implied by the posting of the image to a publically accessible Facebook page.<sup>321</sup> If consent is a defence to an action for invasion of privacy (or if it affects the question of whether the children have a reasonable expectation of privacy) it is unlikely that it would prevent the action from being made out in this case.<sup>322</sup>

On balance the children have a reasonable chance of establishing the elements of a common law action for invasion of privacy, should one be recognised. If detriment is a prerequisite, however, then Lilly will not be able to establish an expectation of privacy.

### *(b) Breach of Confidence*

To be considered confidential, information must be non-trivial and generally inaccessible. Given that the children's mother has posted the image onto her Facebook page with

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<sup>320</sup> *Weller* [2015] EWCA Civ 1176, [31], [33] (Lord Dyson, Master of the Rolls, with Lords Justice Tomlinson and Bean in agreement), although the Master of the Rolls also noted that the court has a role in considering the impact that any particular intrusion may have on the child: at [31].

<sup>321</sup> On the one hand, Facebook users agree in the Terms of Use that publishing content or information using the 'public setting' 'means that you are allowing everyone, including people off of Facebook, to access and use that information, and to associate it with you (i.e., your name and profile picture)': Facebook, *Facebook Terms of Service* (30 January 2015), Term 2(4) < <https://www.facebook.com/legal/terms> > On the other hand, the Terms. On the other hand, this does not constitute a licence for others (other than Facebook itself – see Term 2(1)) to use

<sup>322</sup> When discussing consent in the context of it being a defence to an action for the proposed statutory cause of action for invasion of privacy, the ALRC noted that consent 'must be to the particular disclosure or act complained of'; will be 'ineffective where the conduct performed by the defendant is of a materially different nature to the conduct to which the plaintiff consented'; and 'must relate to the extent of actual publication': ALRC, *Serious Invasions of Privacy*, above n39, 198 [11.61]. Should courts adopt a similar approach in developing a common law cause of action, it is clear that Tyger and Lilly (or their mother on their behalf) has not consented to the use of the photograph on the news service.



public settings, it may be difficult to sustain the argument that when it came into the hands of the online news service the information was properly considered confidential and outside of the public domain.<sup>323</sup> However, the extent to which information is in the public domain is ultimately a question of fact. If the information conveyed by the image is considered to be sufficiently outside the public domain, a question remains as to whether the information nevertheless is of a type that can properly be categorised as confidential which, in the case of personal information, will depend on being able to identify the information as private. As noted above, there is scant Australian authority as to the test that should be applied to determine whether information is ‘private’ for this purpose. However, if the current UK approach were to be adopted, then Tyger and Lilly would need to establish, as a minimum, that they had a reasonable expectation of privacy in relation to the information. This may be possible, as discussed in the preceding section.

However, even if the images can be considered ‘confidential’, it is necessary to consider whether the news service that used the photograph would be under an obligation of confidence to the children. It is clear that an obligation of confidence can arise absent a pre-existing confidential relationship and that an obligation can arise where information has been improperly or surreptitiously obtained.<sup>324</sup> Here the parties are not in a pre-existing relationship of confidence. The photograph of the children was not taken surreptitiously and may not be considered to have been obtained improperly (unless the photograph has been used in breach of copyright — as to which see section (f) below). As previously discussed, it is possible that the *nature* of the information would be sufficient in and of itself to place the person obtaining it under an obligation of confidence — that is, where the information is inherently, or obviously, private. If it is, then there is an argument that the news site will be under an obligation of confidence towards the children. However, on current authority this must be accepted as unlikely.

### *(c) Defamation*

The photographs themselves do not convey any imputations about Tyger and Lilly that have the capacity to defame. The photographs are accompanied by the caption ‘Even very young children are addicted to junk food’. However, it is unlikely that even that imputation would be considered to have a capacity to defame very young children: their standing is not likely to be lowered in the eyes of the ‘ordinary reasonable member’ of society who, to adopt the wording of Ipp JA in *Saunders*, discussed in Chapter Three, is more likely to

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<sup>323</sup> As to the requirement that information be ‘inaccessible’ or ‘outside of the public domain’, see Chapter Three, Part Three (Breach of Confidence) 110-113. Cf *Doe v Yahoo!7 Pty Ltd & Anor* [2013] QDC 181 (9 August 2013) [196] (Smith DCJ) where the court refused to strike out the claim for breach of confidence, finding that it the question as to whether information in the public domain would provide a defence to a breach of confidence action was open to debate.

<sup>324</sup> *Lenah* (2001) 208 CLR 199, 225 [39], Gleeson CJ suggesting that if the ABC had known the information was obtained improperly or surreptitiously that this would be sufficient to place them under an obligation of confidence, where the information itself was private.

feel pity and compassion for the children and who might attribute blame for their circumstances to others.<sup>325</sup>

*(d) Australian Consumer Law*

The photographs have been published on the website of a news service. Although publication is made in a commercial context the provisions as to misleading and deceptive conduct or representations under the ACL<sup>326</sup> do not apply to information providers,<sup>327</sup> and would not, therefore, apply to the news service.

*(e) Intentional or Negligent Infliction of Harm or Harassment*

No cause of action for intentional or negligent infliction of harm or harassment will be available unless the children suffer a recognised psychiatric illness as a result of the use of the image. Moreover, the use of the image by the website on childhood obesity was intended to illustrate a news story, not to cause any harm to the children. Therefore it is unlikely that an action for intentional infliction of harm or harassment would be available, given that actual intent will not be established. As to whether intent could be imputed to the news service this will depend on something 'substantially more certain' than reasonable foreseeability of psychiatric injury.<sup>328</sup> The mental element is, therefore, unlikely to be made out. In terms of an action for negligent infliction of harm, establishing a duty of care will depend upon the extent to which it is reasonably foreseeable that a child of normal fortitude in Tyger and Lilly's position would suffer psychiatric harm as a result of the use of their image in this way, as well the extent to which the actions of the news service in using the image can be considered unreasonable. Further, even if Tyger does suffer a recognised psychiatric illness it is not clear that a causal link could be established between the use of the photograph and the illness, in the sense that Tyger's reaction would arguably be due to the teasing of his friends.

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<sup>325</sup> *Saunders v Nationwide News Pty Ltd* [2005] NSWCA 404 (16 November 2005) IPP JA [16]. Although an attribution of moral blame is probably not necessary in order for material to be considered defamatory, it is probably necessary that the matter affects the plaintiff's standing in some way: See Chapter Three, Part Three (Defamation) 123-124.

<sup>326</sup> ACL s 18(1) (misleading and deceptive conduct); s 29 (false and misleading representations about goods or services).

<sup>327</sup> Ibid s 19 (excluding application of misleading and deceptive conduct provisions); s 38 (excluding application of false and misleading representations about goods or services provisions). For the exclusions to apply the relevant publication must have been made 'in the course of carrying on a business of providing information' (or in the course of certain broadcast services) (s 19, s 38) and will not apply, among other things, to the publication advertisements. An information provider is defined as a 'person who carries on a business of providing information' (s 18(5)).

<sup>328</sup> *Naidu* (2007) 71 NSWLR 471 [76] (Spigelman CJ).

### *(f) Intellectual Property*

Copyright in the image would belong to Tyger and Lilly's mother as the photographer.<sup>329</sup> However, having posted this information onto her Facebook page the privacy settings of which are set to public, the children's mother has agreed to allow 'everyone, including people off Facebook, to access and use that information'.<sup>330</sup> Despite this, it is arguable that this term does not confer on third parties a licence to use copyright material without permission.<sup>331</sup> Accordingly, if the image has been used on the obesity website without her permission she may have a remedy available to her.<sup>332</sup>

### *(g) Information Privacy Legislation*

An online news service may be exempt from the *Privacy Act* if it is considered a media organisation that has published personal information in the course of journalism.<sup>333</sup> However, exemption from the Act does depend upon the news service being 'publicly committed to media standards dealing with privacy'.<sup>334</sup> If the news service that has published Tyger and Lilly's photograph is committed to such standards then the use of this photograph may well be contrary to these.

Where the news service is not publicly committed to media standards dealing with privacy, it may be bound by the *Privacy Act*. If so, the use of Tyger and Lilly's image may contravene the APPs relating to collection of information. This depends firstly on whether the photograph of Tyger and Lilly can be considered 'personal information'. Given that the photographs have been made publically available, the fact that some people are able to identify the children (even if the news organisation itself cannot) might suggest that

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<sup>329</sup> *Copyright Act 1968* (Cth) s 35(2). See also Facebook, *Statement of Rights and Responsibilities* (30 January 2015) < <https://www.facebook.com/legal/terms> > term 2 — noting that users own all of the content and information they post on Facebook.

<sup>330</sup> Facebook, *Statement of Rights and Responsibilities* (30 January 2015) < <https://www.facebook.com/legal/terms> > term 2(4).

<sup>331</sup> This is because the wording in term 2(4) can be contrasted with the very clear wording in term 2(1) which grants Facebook a 'non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook': *Ibid* term 2(1). Moreover, there is no direct contractual relationship between a Facebook user and a third party who has used content posted on Facebook.

<sup>332</sup> However, this will depend on whether, *inter alia*, the use of the image is subject to a fair dealing exception under *Copyright Act 1968* (Cth) — the only fair dealing exception that is likely to be relevant here is fair dealing for the purpose of reporting news (s 42) although it is unlikely that the website would be considered to be reporting news and, in any event, there may have been no acknowledgement of the work (as required by s 42(1)(a)).

<sup>333</sup> *Privacy Act* s 7B(4).

<sup>334</sup> *Ibid* s 7B(4)(b). The ALRC has noted that: 'For a media organisation to meet the requirement of being 'publically committed' to media privacy standards, it must both expressly commit to observing the standards and evidence conduct of such observance': ALRC, *For Your Information*, above n 9, vol 2, 1471 [42.124]. In 2007 the Privacy Commissioner refused to find a newspaper exempt from the *Privacy Act* on the grounds that it could not establish it was publicly committed to privacy: *U v Newspaper Publisher* [2007] PrivCmrA 23. Despite that, no breach of the *Privacy Act* was found.

the image is personal information. However, as discussed above,<sup>335</sup> it may be necessary for a broad enough section of the public to be able to identify the children from the image to be considered personal information. In any event, if the photographs have been taken directly from the children's mother's public Facebook page, it is likely that the news service would be aware of the identity of the children in the photographs and the photograph would then be considered 'personal information'.

Where personal information is collected by an organisation, the collection of that information must be reasonably necessary for one or more of the organisation's functions or purposes.<sup>336</sup> Although the news service would no doubt argue that illustrative photographs are necessary for journalistic purposes, there is a counterargument that an anonymous photograph (for example, where the children's faces are pixelated or otherwise obscured) would suffice. In addition, information must be collected by lawful and fair means — if the taking (and subsequent use) of the photograph by the news service infringes the copyright owned by Tyger and Lilly's mother, the collection is neither lawful nor fair. If there is no issue of copyright infringement, however, then the collection of the photograph may be considered both lawful and, because there is no issue of covert photography, fair. The news service may also need to comply with the APPs relating to use of and dealing with personal information. These APPs apply where an APP Entity 'holds' personal information which it does where it has possession or control of a record that contains the personal information.<sup>337</sup> In any event, the use of the photograph for the purpose of illustrating the news story is unlikely to be a contravention of any of the APPs relating to the use of or dealing with personal information that is not sensitive information.<sup>338</sup>

In summary, although a complaint may be addressed to the OAIC it is uncertain whether the news service would be considered to have contravened the *Privacy Act* in its collection and subsequent use of the photograph.

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<sup>335</sup> See Case Study One (Jackie) – Information Privacy Laws and, esp, above n 71; see also Case Study Three (Alison) – Information Privacy Laws.

<sup>336</sup> *Privacy Act* sch 1, APPs 3.2, 4.1. The Explanatory Memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth), 53 explains that whether collection is reasonably necessary is to be judged 'interpreted objectively and in a practical sense'.

<sup>337</sup> *Privacy Act 1988* (Cth) s 6(1) – definition of 'holds'. A record, in turn, includes a document but does not include a generally available publication: s 6(1) – definition of 'record'. Although the photograph of Alison, having been available on the internet, would have been a generally available publication, after it was collected by Virgin it would have been held as a document or file that was not publically available. For that reason the APPs relating to the dealing with information will then apply to the information.

<sup>338</sup> Use of personal information for a purpose other than a primary purpose is subject to certain conditions: *Ibid* sch 1, APP 6. However, in this case the primary purpose of collection was for use in the advertising campaign so the privacy principle has not here been contravened.

#### *(h) Enhancing Online Safety for Children Legislation*

The photograph was originally published on Facebook, which is, at the time of writing, a Tier 2 social media service for the purposes of the *Online Safety Act*.<sup>339</sup> However, the concern relates to the use of the photograph on a news website. The posting of the photograph on the news website will not be considered posting on a social media service or relevant electronic service within the meaning of the Act.<sup>340</sup> Accordingly, there is no ground for complaint to the e-Safety Commissioner about the use of the photograph on the news website. Although Tyger or Lilly (or a person on their behalf) could complain about the posting of the photograph by their mother on Facebook, the photograph would not, in any event, be determined to be ‘cyberbullying material targeted at an Australian child’. This is because an objective person would not consider the material was ‘intended to have an effect on a particular Australian child’ given that it was posted by the children’s mother (presumably) as a record of or means of sharing a photograph of her children with her friends and others.

#### *(i) Contract/Internet Content Regulation/Industry Regulation*

Tyger and Lilly, or their parent or parents on their behalf, could certainly request the news service to remove the photograph from its website. The news service may agree to this, although they are unlikely to have any obligation to do so.

It is also possible that the use of the image would contravene the news service’s own privacy policy or be contrary to a code of ethics that they subscribe to; these factors may influence the news service in its decision to remove the image.<sup>341</sup>

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<sup>339</sup> Office of the Children’s eSafety Commissioner, *Social Media Partners*, Social Media Regulation <<https://www.esafety.gov.au/social-media-regulation/social-media-partners>>.

<sup>340</sup> A relevant electronic service is defined in the *Online Safety Act* s 4 as any of the following: ‘(a) a service that enables end-users to communicate, by means of email, with other end-users; (b) an instant messaging service that enables end-users to communicate with other end-users; (c) an SMS service that enables end-users to communicate with other end-users; (d) an MMS service that enables end-users to communicate with other end-users; (e) a chat service that enables end-users to communicate with other end-users; (f) a service that enables end-users to play online games with other end-users; (g) an electronic service specified in the legislative rules. A social media service is defined in s 9 as a relevant electronic service specified in the legislative rules (other than exempt services) or one that satisfies all the following conditions: (a) the sole or primary purpose of the service is to enable online social interaction between 2 or more end-users; (ii) the service allows end-users to link to, or interact with, some or all of the other end-users; (iii) the service allows end-users to post material on the service; (iv) such other conditions (if any) as are set out in the legislative rules; or (b) an electronic service specified in the legislative rules; but does not include an exempt service (as defined by subsection (4) or (5)).’

<sup>341</sup> In its 2008 report, *For Your Information*, the ALRC noted that stakeholders had ‘raised particular concerns about the manner in which the media handles certain type of personal information, including the personal information of children and young people’: ALRC, *For Your Information*, above n 9, 1462 [42.90] The Commission also expressed the view, in the context of discussing the self-regulatory regime applying to print media, that it had: ‘ongoing concerns about the capacity of a self-regulatory system to preserve the tenuous balance between the public interest in freedom of expression and the public interest in adequately safeguarding the handling of personal information’: ALRC at 1472 [42.128]. Interestingly, the Independent Inquiry into the Media and Media Regulation reports on findings of research on media reporting of the Black Saturday fires in Victoria, 2009, such that there was ‘no consensus about obtaining prior consent before

*(j) Summary of the Legal Position for Case Study Five*

In summary, Tyger and Lilly would have some prospect of success if a common law action for invasion of privacy was to be recognised in Australia. The children may also be able to establish an action for breach of confidence, although would face the obstacle of proving that the image had not entered the public domain due to its publication on their mother's Facebook page. It is unlikely that any other cause of action would be available to the children (or their parents) in respect of the use of the photograph to illustrate the news story, although the children's mother may be able to establish that the news site had infringed her copyright in the image.

Even if bound to comply with the APPs, the news service is unlikely to have contravened any APPs in relation to its collection and use of the photograph, although the position may be different if it can be established that collection and use of the image infringed the mother's copyright. The e-Safety Commissioner has no standing in respect of the use of the photograph on a news website that is not a social media service or relevant electronic service under the *Online Safety Act*. Neither is the posting of the photograph on the mother's Facebook page ground for complaint to the e-Safety Commissioner, as the photograph would not be considered cyberbullying material targeted at an Australian child.

**F Case Study Six (Ben)**

**1 Scenario**

Ben is 11 years old and comes from a large family. Last year Ben's uncle David was driving Ben and three of Ben's cousins home from watching a football game. At that time, Ben's cousins ranged in age from 8 to 17. During the journey Ben's uncle swerved to avoid an animal that had wandered onto the highway, causing the car to veer onto the opposite side of the road and then to collide with a tree. In the collision David suffered serious head injuries and was trapped behind the steering wheel. Ben's oldest cousin, who had been travelling in the front passenger seat, was relatively unhurt and managed to escape from the car and raise the alarm. The other three children, including Ben, travelling in the rear of the vehicle were also not seriously hurt, although all three were in shock and had sustained minor facial injuries and bruising. None of the three children in the back of the car were able to exit the vehicle, however, because of child locks on the doors. Ben's oldest cousin, himself in shock, did not think to open the rear doors from the outside.

The police, two ambulances and a fire truck arrived on the scene. Unbeknown to any of Ben's family at the time, a TV news crew from the commercial broadcaster,

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using images and content from social media sites such as Facebook': The Hon R Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation*, Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012 198.

Network5 TV,<sup>342</sup> also attended the scene and captured footage of the accident. That footage showed, among other things, Ben and his other two cousins being attended to by ambulance officers, while still in the back of the car; Ben crying; and Ben being helped into the back of one of the ambulances. The footage of the accident was aired on the TV news the day after the accident. Ben did not see the news, and neither did any of those involved in the accident, although a number of Ben's family members and his friends did see it. However, the footage also appeared on Network5's website as an embedded video.

Ben is very distressed when the embedded video is reposted on one of his school friend's social media pages and 'liked' by a large number of mutual friends. However, Ben's other two cousins, also shown in the footage, are unconcerned about being on TV or having the video reposted online.

## 2 Background and Key Features

This is a hypothetical scenario that is, however, based loosely upon the facts of *Andrews v Television New Zealand Limited*,<sup>343</sup> a case concerning a husband and wife whose involvement in a car accident was filmed and shown on TV, without their knowledge or consent, as part of a documentary series on the work of firefighters.<sup>344</sup> A key difference between that scenario and this case study is that in *Andrews* the footage in question depicted not only images of the plaintiffs but also their intimate conversations with each other and exchanges with the rescuers. Another key difference is that in *Andrews* the footage was part of a documentary rather than a news program.

A key feature of this case study is that although Ben is distressed about the online publication of the video, other subjects of the video are not.

Before considering the various legal avenues open to Ben, if any, it is necessary to consider who Ben would bring an action against. The case study indicates that Ben is distressed due to the particular use of the footage — the fact that it has been embedded on one of his friend's social media pages. This might be distressing because it exposes Ben's vulnerabilities to a group of people he knows. However, assuming that Ben's friend has legally embedded the video into his social media page, Ben's complaint is likely to be only with the TV company that took and published the footage. Unless he is able to bring an action against the TV company, there will be no means of redress vis-a-vis the subsequent republication of that footage. This can be distinguished from the facts in Case Study Five (Tyger and Lilly) where the use of the children's image to illustrate a website on obesity changed the nature of the information conveyed by way of the image alone. Therefore,

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<sup>342</sup> Fictitious name, but assume that the broadcaster is an Australian commercial broadcaster.

<sup>343</sup> (Unreported, High Court of New Zealand, Allan J, 15 December 2006) ('*Andrews*').

<sup>344</sup> There are also similarities with the Californian case of *Shulman v Group W Productions Inc* 18 Cal 4<sup>th</sup> 200 which involved the capture and broadcast of conversations and footage, without consent, during a car accident rescue operation.

the following discussion considers only whether Ben would have a right of action vis-a-vis the initial publisher (the TV station).

### 3 *Discussion of the Law*

#### *(a) Action for Invasion of Privacy*

In order to bring an action for invasion of privacy, Ben would likely need to establish that he had a reasonable expectation of privacy in relation to the use of his image by the broadcaster.

A person involved in a car accident cannot be said to have a reasonable expectation of privacy vis-a-vis being observed by others at the time, as the accident occurs in a public place and necessitates the attendance of various emergency service workers. The relevant question, then, is whether a person involved in a car accident can reasonably expect not to be filmed or not to have footage of the accident aired on TV, at least in a way which identifies them. That question was considered in the case of *Andrews*, discussed below.

In *Andrews*, the New Zealand High Court held that a couple involved in a car accident did have a reasonable expectation of privacy; however, the expectation arose because the footage of the car accident, used in a documentary series about fire fighters, included not only images of the plaintiffs, but also sound recordings of 'intimate' conversations between the two of them. Allan J expressed the following view:

Neither was aware they were being filmed throughout from close range. I do not accept, as Mr Akel submitted, that the footage of the plaintiffs went no further than observing them at the scene. It went much further than that. The length of the screened footage combined with the accumulation of depicted intimate communications, serves to distinguish the privacy expectations in this case from those in which images portrayed and the information conveyed can be characterised as part and parcel of general news footage.<sup>345</sup>

In this case the footage of the car accident, while showing close-up images of Ben, did not depict any intimate conversation or exchanges between Ben and anyone else. Moreover, because the film was made for the purposes of a news broadcast it would necessarily have been of shorter length than footage used in a documentary. The footage in which Ben is depicted may be described as 'part and parcel of general news footage' and for this reason Ben's privacy expectations may be lower than those of the *Andrews*. Further, although Ben is involuntarily involved in a traumatic experience, that experience cannot be described as one in which the subject expected to be 'reasonably imperceptible'.<sup>346</sup>

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<sup>345</sup> *Andrews* (Unreported, High Court of New Zealand, Allan J, 15 December 2006) [65].

<sup>346</sup> The ALRC refers to the views expressed by Nicole Moreham as to circumstances in which a person in a public place may be said to have a reasonable expectation of privacy, which include circumstances in which a person is involuntarily experiencing a traumatic or intimate experience and where they would expect to be 'reasonably imperceptible': ALRC, *For Your Information*, above n 9, 2567 [74.126], but expresses no view



Even if is able to establish a reasonable expectation of privacy vis-a-vis the recording of the accident footage for news purposes, he would probably also need to prove that the airing of the footage was a *serious* invasion of privacy, or possibly that it was a highly offensive invasion of privacy. In determining this, courts might take into account, among other things, the degree of offence, distress or harm to the dignity of a person of ordinary sensibilities in Ben's position. In *Andrews* the court was required to decide whether airing of the footage would be considered highly offensive. In that case publication of footage was not considered to satisfy the offensiveness test. Allan J noted that the plaintiffs had acknowledged that nothing in the footage presented them in a bad light or was 'inherently' embarrassing or distressing and referred to the judgment of Gault P and Blanchard J in *Hosking* where their Honours said that concern is with publicity that is truly humiliating, distressful or otherwise harmful, and not with publicity, even extensive publicity, of matters which 'although private, are not really sensitive'.<sup>347</sup> If similar considerations are applied to Ben's case it is unlikely that publication of the news footage would be considered offensive to a person in Ben's position. The fact that others involved in the accident did not experience offence or distress is a relevant, although not conclusive, consideration. However, as already noted, the degree of offence, distress and harm is only one relevant consideration.<sup>348</sup>

In addition to establishing a reasonable expectation of privacy in relation to the footage, and possibly that the invasion was sufficiently serious, Ben would need to establish other elements of the action, which may include intention or fault on the part of the broadcaster. As noted above, it is not clear whether this would require Ben to establish

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on whether or not it agrees that this would be sufficient to give rise to a reasonable expectation of privacy: cf *Peck* [2003] I Eur Court HR 123. Here the applicant was filmed by CCTV attempting to commit suicide. A segment of the footage, and still photographs from it, were later published on TV, and featured in newspapers and other press outlets. The government of the United Kingdom argued that the applicant's actions were in the public domain and that '[d]isclosure of those actions simply distributed a public event to a wider public and could not change the public quality of the applicant's original conduct and render it more private.' The European Court of Human Rights found, however, that the applicant's private life was engaged by publication (but not capture) of the relevant footage and that publication amounted to a serious interference with the applicant's right to respect for his private life: 'the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation ... and to a degree surpassing that which the applicant could possibly have foreseen': at [62]. However, it was relevant to the court's decision that the applicant was 'deeply perturbed and in a state of distress': at [62]. The applicant also maintained that he did not know he was being filmed: at [54].

<sup>347</sup> *Hosking* [2005] 1 NZLR 1 [126].

<sup>348</sup> Note here that Moreham has criticised the decision in *Andrews* on the basis that the approach taken by the court in determining that publication was not highly offensive because it 'did not make the plaintiffs "look bad"' obscures the 'dignitary nature of the privacy interest': N A Moreham, 'Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort' (Legal Research Paper No 113/2015, Victoria University of Wellington, 2015) 242. According to Moreham: 'By using the couple's conversations to liven up their documentary, the broadcasters turned a private trauma into a public spectacle to be used to further their own professional and commercial ends; what was to the plaintiffs an intimate and traumatic experience, in the defendant's hands became simply a segment in a television documentary. This was humiliating regardless of whether the tone of the documentary was positive or negative': N A Moreham, 'Why is Privacy Important?' 242.

that the invasion of his privacy was ‘wilful’<sup>349</sup> or negligent,<sup>350</sup> and whether intent could be imputed to the broadcaster on the basis that a reasonable person would know that intrusion, misuse or disclosure were obviously or substantially likely to follow.<sup>351</sup> If a wilful invasion is necessary, this element is unlikely to be made out.

A court would also need to balance the public interest in Ben’s privacy with other matters of public interest, including the interest of the public to be informed about matters of public concern, and the public interest in freedom of expression generally. As the footage was captured in the context of reporting on a traffic accident, the TV station has a strong case for arguing that any traffic accident is a matter of public concern and that sensitive reporting of a traffic accident, including footage from the accident, should outweigh any individual’s privacy claims.<sup>352</sup> In contrast to Case Study Three (Alison) and Case Study Five (Tyger and Lilly), the news service has used authentic images rather than pre-existing images of an individual not directly implicated in the story; thus there is a stronger public interest argument for the news service, and the images of Ben were not readily interchangeable with other images. However, there is an argument that the ‘close-up’ footage of Ben oversteps the mark and is disproportionate to the public interest in being informed about the road accident, or road accidents in general. In this regard, the extent to which the broadcaster complied with relevant broadcasting codes (as to which see section (h) below) may be a relevant consideration.

Overall, Ben has little chance of establishing a reasonable expectation of privacy for the purposes of an action for invasion of privacy. Even if this and other elements are satisfied, however, public interest considerations in free expression, incorporating freedom of the press and the right of the public to information would likely outweigh Ben’s privacy interest, unless the reporting was considered excessive.

### *(b) Breach of Confidence*

The footage obtained by the TV crew will only be considered confidential information if it is non-trivial and outside of the public domain (inaccessible) and, possibly, if it can be ‘recognised’ as confidential based on a quality other than these negative attributes. The information relayed in the footage concerns events which played out in public. This in itself does not necessarily mean the information was generally accessible, as it was observable only to a limited audience. Even if this information is considered ‘inaccessible’

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<sup>349</sup> See *Grosse* (2003) Aus Torts Reports ¶81-706, 64,187 [444] (Skoien DCJ).

<sup>350</sup> See *Doe v ABC* [2007] VCC 281 (3 April 2007) 52, 159 (Hampel J).

<sup>351</sup> ALRC, *Serious Invasions of Privacy*, above n39, 110 [7.7].

<sup>352</sup> As to this, see the discussion in *Andrews* (Unreported, High Court of New Zealand, Allan J, 15 December 2006) [80]–[94] and, in particular [91] where the court noted that if it had been necessary to do so, it would have upheld a the defendant’s defence of public concern: ‘The television series, while providing a certain level of entertainment, nevertheless had a serious underlying purpose.’ See also the discussions as to what is ‘newsworthy’ in *Shulman v Group W Productions Inc* 18 Cal 4<sup>th</sup> 200, including Werdegart J’s remarks (at 223) that ‘when a person is involuntarily involved in a newsworthy incident, not all aspects of the person’s life and not everything the person says and does, is thereby rendered newsworthy.’

and non-trivial, however, this is unlikely to be enough. The information does not fall readily into a category of information that is obviously or inherently private or that courts have typically recognised as possessing a quality of confidence. Therefore, Ben would need to establish that the information should be treated as 'private'. As noted in Chapter Three and above, there is little Australian authority as to the test that should be applied to determine whether information is private for the purpose of a breach of confidence action - if courts were to follow the UK approach here, Ben would need to establish, as a minimum, that he had an expectation of privacy in relation to the use of the information. As discussed in the preceding section, it is unlikely that Ben would be able to establish this. Accordingly a breach of confidence action will not succeed against the TV station because the information itself will not be considered to possess the necessary quality of confidence.

*(c) Defamation*

The footage conveys no imputations that have the capacity to defame.

*(d) Australian Consumer Law*

The video footage was aired on TV and later published on the website of the news service. Even though publication has been made in a commercial context, as already noted above, the provisions as to misleading or deceptive conduct or representations under the ACL<sup>353</sup> do not apply to information providers,<sup>354</sup> and would not, therefore, apply to the news service even if the images conveyed something that was misleading or deceptive (which they do not).

*(e) Intentional or Negligent Infliction of Harm or Harassment*

Unless Ben suffers a recognised psychiatric illness as a result of the footage of the accident being aired on TV or being made available on the internet, no action for intentional or negligent infliction of harm or harassment can be brought. If Ben were to suffer a recognised psychiatric illness then an action for intentional infliction of harm or harassment would depend upon establishing the requisite intent on the part of the news service. Given that the purpose of the footage being captured and aired was not to harm Ben but to form part of the news broadcast, neither action is likely to succeed. Intention is also not likely to be imputed to the news service for the same reasons given in relation to Case Study Five (Tyger and Lilly) above. An action for negligent infliction of harm will also be unavailable, not least because it would be necessary to establish that the news

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<sup>353</sup> ACL s 18 (misleading and deceptive conduct); s29 (false and misleading representations about goods or services).

<sup>354</sup> Ibid s 19 (excluding application of misleading and deceptive conduct provisions); s 38 (exclusive application of false and misleading representations about goods or services provisions). For the exclusions to apply the relevant publication must have been made 'in the course of carrying on a business of providing information' (or in the course of certain broadcast services) (s 19, s 38) and will not apply, among other things, to the publication advertisements. An information provider is defined as a 'person who carries on a business of providing information' (s 18(5)).

service had acted unreasonably in airing the footage in question. Even if the news service can be said to owe a duty of care not to cause mental harm to Ben through publication of the footage (and this would only be the case if mental harm on the part of a person of normal fortitude was reasonably foreseeable), this duty is probably discharged through reporting that is sufficiently sensitive and accurate.<sup>355</sup>

*(f) Information Privacy Legislation*

As discussed in relation to Case Study Five (Tyger and Lilly), a media organisation is exempt from the *Privacy Act* if personal information is published in the course of journalism. However, exemption from the Act does depend upon the news service being 'publicly committed to media standards dealing with privacy'.<sup>356</sup> If the news service that has broadcast the footage is committed to privacy then the use of the footage is unlikely to contravene the *Privacy Act*.

Given that all commercial broadcasters in Australia are publicly committed to privacy standards, the news service will almost certainly be exempt from the provisions of the *Privacy Act*.

*(g) Enhancing Online Safety for Children Legislation*

The film footage will not constitute cyberbullying material targeted at an Australian child so there will be no grounds for complaint to the e-Safety Commissioner under the *Online Safety Act*.

*(h) Contract/Internet Content Regulation/Industry Regulation*

Ben could request the news service to remove the video from its website. However, the news service would only be likely to agree to this if the video contravened its own privacy policy or was contrary to an applicable code of ethics.

In terms of the airing of the news on television, the content of the program will be governed by a relevant code of practice. As Network5 is a commercial broadcaster, the relevant code would be the Commercial Television Industry Code of Practice. That code provides, among other things, that licensees must 'not broadcast material relating to a person's personal or private affairs or which invades an individual's privacy, unless there is a public interest reason for the material to be broadcast; or the person has provided implicit or explicit consent for the broadcast.'<sup>357</sup> Moreover, licensees must 'exercise special care before broadcasting material relating to a Child's personal or private affairs in a report of a sensitive matter concerning the Child'.<sup>358</sup> The code also provides that licensees must 'exercise sensitivity in broadcasting images of or interviews with bereaved

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<sup>355</sup> Here a relevant factor will be the extent to which the broadcaster has complied with an applicable code of practice in relation to the broadcast – this is discussed further in sub-section (h) below.

<sup>356</sup> *Privacy Act* s 7B(4)(b) and above n 334.

<sup>357</sup> Commercial Television Industry Code of Practice 2015, cl 3.5.1.

<sup>358</sup> *Ibid* cl 3.5.2.

relatives or people who have witnessed or survived a traumatic incident.’<sup>359</sup> Although Ben himself is unhappy about the airing of the footage, this does not mean (as discussed above) that it is invasive of his privacy. However, ACMA, which investigates breaches of the relevant code of practice, has previously accepted that although filming that takes place in a public place is generally not considered private, there may be circumstances when it will be invasive of privacy.<sup>360</sup> In 2009 ACMA investigated a TV news report of a boating accident in which two people had died and other family members had been seriously injured.<sup>361</sup> A survivor of the accident, the owner of the boat and son of the deceased couple, was filmed sobbing on a hospital trolley as he was being wheeled into an ambulance. Without recording a finding as to whether particular footage was invasive of privacy, ACMA expressed the view that ‘an ordinary reasonable viewer would have been likely to find highly offensive the continuing lengthy footage of the survivor’s expressions of grief.’<sup>362</sup> However, ACMA acknowledged that:

in the aftermath of an accident in a public place, a reasonable viewer might not ordinarily consider the broadcast of images of accident victims to be an invasion of an individual’s privacy. ACMA maintains that the decision as to whether or not the broadcast of particular material amounts to an invasion of privacy must therefore be assessed on its own merits and in its particular context. These decisions are, by their nature, complex and are dependent on the facts of each individual case.<sup>363</sup>

Therefore, it is difficult to conclude whether the broadcast of the footage of Ben would be considered invasive of his privacy should a complaint be addressed to ACMA. An important difference between Ben’s situation and that described above, however, is that Ben is suffering from distress but not from grief. It was also a relevant factor in the decision referred to above that the victim had made clear his objections to being filmed, but such filming had continued nonetheless.<sup>364</sup> In Ben’s case, he is not aware of being filmed.

Moreover, there is an arguable public interest reason for the material to be broadcast, given that it shows the aftermath of a vehicle accident in the context of a news report.<sup>365</sup> In ACMA’s investigation of Ten News at Five, referred to above, it acknowledged that:

there was an identifiable public interest reason in reporting the boating incident in terms of boating safety and that there may have been a public interest in conveying images of the

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<sup>359</sup> Ibid cl 3.2.1(d).

<sup>360</sup> ACMA, *Investigation Report Number 2027*, Ten News at Five: Broadcast 3 May 2008, ACMA2008/1100, 6.

<sup>361</sup> Ibid.

<sup>362</sup> Ibid, 7.

<sup>363</sup> Ibid, 8.

<sup>364</sup> Ibid, 8.

<sup>365</sup> This was discussed above, see section 3(a) of this case study (Action for Invasion of Privacy).

survivors of the accident. However, the use of the material of the identifiable accident victim in a state of obvious distress for a prolonged period would not have been justified in the context of the broadcast as a whole.<sup>366</sup>

Accordingly, it is possible that the footage of the aftermath of the accident in which Ben was involved would be considered in the public interest. However, given that Ben was identifiable and in an obvious state of distress, the length of the footage in the context of the broadcast as a whole would be a relevant consideration.

Neither is it clear that the TV station acted insensitively.<sup>367</sup> However, against this, there is an argument that Ben's consent should have been sought for airing of the images; or (where the TV station regarded that this was impracticable) that close-up images of the survivors should have been avoided; or that the images should have been pixelated so that Ben was not identifiable.

A complaint about breach of the code should first be addressed to the TV station but can be forwarded to the Australian Media and Communications Authority ('ACMA') if Ben is dissatisfied with the response.<sup>368</sup> Even if such a complaint is upheld, however, the footage has already been broadcast on television, and ACMA is most likely to require the broadcaster to take measures to ensure *future* compliance.<sup>369</sup> Moreover, a finding that the news service has breached the Commercial TV code will not *necessarily* impact upon the continuing availability of the news footage on the internet. The Report of the

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<sup>366</sup> Ibid, 11.

<sup>367</sup> Few ACMA investigations have considered whether a TV broadcaster has breached the relevant code by failing to exercise sensitivity in broadcasting images of or interviews with bereaved relatives or people who have witnessed or survived a traumatic incident. However, a relevant finding is ACMA's 2009 investigation of Ten News at Five: ACMA, *Investigation Report Number 2027*, above n 367360. Ten News was found to have breached clause 4.3.6 (not exercising sensitivity in broadcasting images of a bereaved relative, survivor and witness of a traumatic incident) of the then current 2004 Commercial Television Code of Practice. ACMA's reasons for that finding included the fact that the victim depicted was 'clearly distraught and grief-stricken' as well as 'visibly angered by the presence of the camera', and that the film crew continued to film despite being told to 'go away': ACMA, *Investigation Report Number 2027*, above n 367360, 12-13. Again, a key difference between that situation and this is that Ben was not grief-stricken and was not aware of (and therefore did not object to) being filmed. However, other considerations such as the length of the footage will be instructive.

<sup>368</sup> BSA s 148.

<sup>369</sup> ACMA, *Broadcasting Rules and Complaints* <<http://www.acma.gov.au/theACMA/ACMAi/Complaints/Broadcast-complaints/faqs-broadcasting-rules-and-complaints-acma-1#30>> (What can ACMA do if a Broadcaster Breaches a Code Provision?), noting that ACMA may 'agree to accept measures by broadcasters to improve compliance', or accept an 'enforceable undertaking for the purpose of securing future compliance'. Moreover, the Report to the Minister for Broadband, Communications and the Digital Economy, noted that an ACMA investigation of a broadcasting complaint takes months to finalise: Finkelstein above n 341, 179-80 [6.60].

Independent Inquiry into the Media and Media Regulation notes that online publishers are generally not subject to any form of regulation, other than having to comply with the law of the land.<sup>370</sup> Nevertheless, as also noted in that report, broadcasters generally apply the same editorial standards to online content as they do to offline content and, on that basis, the TV station may decide to remove or edit the online footage.<sup>371</sup> Even if the footage is removed from the TV station's website, however, this does not compel individuals or online content providers<sup>372</sup> who have linked to that footage (such as Ben's school friend) to remove it.

*(i) Summary of the Legal Position for Case Study Six*

In summary, Ben is unlikely to have any cause of action against the news station in respect of the airing of the footage. He has little chance of establishing a reasonable expectation of privacy for the purposes of an action for invasion of privacy and for that reason, among others, is also unlikely to establish that the publication of the footage was made in breach of confidence. The footage of the car accident imputes nothing that has the capacity to defame Ben and, even if Ben has suffered a recognised psychiatric illness, an action for intentional infliction of harm or harassment is unlikely to lie against the news service on the basis that they lack the requisite intent.

Assuming that the news service is publically committed to privacy, the service will not be bound by the APPs and the footage does not constitute cyberbullying material, so there are no grounds for a complaint under the *Online Safety Act*. Unless the news service agrees to remove the video from its website, therefore, there are unlikely to be any legal avenues of redress open to Ben and even a complaint for breach of the Commercial TV code is unlikely to affect the continuing availability of the footage online.

G *Case Study Seven (Schoolboy Rowers)*

1 *Scenario*

A photograph is taken of 16 and 17 year old schoolboy rowers in their boat, participating in an inter-school rowing competition. Each of the boys, with the exception of the coxswain, is clearly visible. The photograph appears on the school website. Written consent had been provided to the school by each of the boys and their parents for the taking and use of the photograph. Sometime later it comes to light that the photograph has been copied from the website and reposted on a gay voyeuristic blog. The blog is run by an individual or group who uses a pseudonym

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<sup>370</sup> Finkelstein above n 341, 279 [11.1]. The report also notes, however, that two non-print media online publishers (crikey.com.au and ninemsn) are regulated only by the self-application of a code of conduct: at 279 [11.1].

<sup>371</sup> Ibid 165 [6.24].

<sup>372</sup> An online content provider is used here to mean any person who makes content available on the internet whether or not they authored or created the content themselves and whether or not the content is hosted by themselves or another person. See, further, the list of Defined Terms used in this thesis.

and is hosted by blog hosting site ‘Dodgee’,<sup>373</sup> which is located in Eastern Europe and which has no servers in Australia. The discovery is made by a journalist investigating the proliferation of websites using images of children and young people. The journalist informs the school, which, in turn, informs each of the rowers. The matter is also widely reported in the press.

## 2 Background and Key Features

Although hypothetical, this scenario is very closely based on a real-life situation that came to light in 2002 and which is referred to by SCAG in its discussion paper *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*. SCAG writes that:

... in February 2002 the media reported the discovery of a website containing photographs of teenage Melbourne school boys taken without consent. The website featured pictures of male students involved in a variety of sporting activities such as rowing and playing football.<sup>374</sup>

A key difference between the scenario here and the situations referred to by SCAG is that the photographs referred to by SCAG were taken without consent. In the scenario that forms this case study, the photographs were taken and initially published with express consent, but their republication on the voyeuristic website has taken place without the consent or prior knowledge of the image subjects.

## 3 Discussion of the Law

### (a) Action for Invasion of Privacy

The use of the image on the website may be considered an ‘appropriation’ of image if the website obtained pecuniary gain by its use of the image (for example, if the blog is accessible only by paying customers). As discussed above, in relation to Case Study Three (Alison), it is unlikely that the appropriation of an image is, in itself, sufficient to create a reasonable expectation of privacy for the purpose of an action for invasion of privacy. As the photograph was not captured in circumstances involving an intrusion upon seclusion and does not depict a private activity or inherently private information, it is likely that the boys would need establish that a reasonable expectation of privacy arose due to the particular use of the image. This would require courts to take a broad approach as to what situations constitute a reasonable expectation of privacy. As discussed above (see, in particular, Case Study Five (Tyger and Lilly)) it is possible that courts may be prepared to do this, particularly bearing in mind the age of the boys. If courts are prepared to accept that the boys have a reasonable expectation of privacy in relation to the use of their image on the website, other elements of the common law action are likely to be met.

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<sup>373</sup> Fictitious name.

<sup>374</sup> SCAG, Standing Committee of Attorneys General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper (2005) 6 [7].



### *(b) Breach of Confidence*

To establish breach of confidence, the rowers must be able to establish that the information conveyed by the image has a quality of confidence. That is, it is non-trivial, inaccessible and falls into a category of information that can be recognised as confidential. The information conveyed by the image in and of itself only depicts the boys engaged in a sporting activity. It would probably be considered trivial. Given that the information was posted on the school website, it may also be considered to be in the public domain. Ultimately, this is a question of fact. However, the boys also gave consent for the information to be posted online so that they cannot be said to have taken steps to guard the accessibility of the information. This is likely to be fatal to any claim that the information possessed a quality of confidence. In addition, the information itself does not fall into a category of information that has typically been regarded as confidential and there is nothing inherently private about the information.

It is possible, however, that courts could be persuaded to treat as confidential information that is nevertheless accessible (and trivial), even where it is not inherently private, if the boys can establish an expectation of privacy in relation to the use of the information complained of. As discussed in the preceding section, it is possible that the boys could establish a reasonable expectation of privacy in relation to the use of the information on a voyeuristic website, but this is by no means certain. However, even if the information can be considered private, there is little authority for imposing an obligation of confidence upon the internet content host. There is no pre-existing relationship of confidence between the parties; the information has not been obtained improperly or surreptitiously (although there is an argument that the reposting of the photograph would constitute an infringement of copyright and, on this basis, be considered to have been obtained improperly); and the information is not obviously or inherently private. Therefore, an obligation of confidence would need to be imposed on the basis that the content host knew or ought to have known that there was an expectation of privacy in relation to the publication or use of the information. Although it is arguable that an obligation of confidence should be imposed in these circumstances, there is little Australian authority for this.

### *(c) Defamation*

In order to establish that publication of the photograph on the voyeuristic website is defamatory, imputations would have to be identified that have the capacity to defame the boys. As the photograph depicts the boys engaged in a sporting activity, there is nothing inherently defamatory about the image. It is possible that the context of the publication gives rise to an imputation that has the capacity to defame, for example, that the boys allowed themselves to be photographed for the purposes of appearing on such a website, or allowed the photograph to be reproduced on the website. Even so, a considerable hurdle here would be establishing that such imputations were open to the

reasonable reader: it is more likely that the reasonable reader (given the nature of the website) would assume that the photograph had been reproduced without permission or knowledge. A defamation action is therefore unlikely to succeed.<sup>375</sup>

*(d) Intentional or Negligent Infliction of Harm or Harassment*

An action for intentional or negligent infliction of harm or harassment is only possible if any of the boys suffers a recognised psychiatric injury or illness as a result of posting of the images on the website in question. Even then, however, establishing the requisite intention for the purpose of an action for intentional infliction of harm or harassment will be difficult, as the publisher of the photographs is likely to argue that the purpose of posting the images was for the gratification of those accessing the site, rather than to harm the boys. It is possible, however, that intention could be imputed to the content host but only with 'something substantially more certain' than the reasonable foreseeability of psychiatric injury.<sup>376</sup>

Assuming any of the boys suffers a recognised psychiatric injury as a result of knowledge of the image on the website, the biggest obstacle in bringing a negligence action (apart from the fact that the content host is located overseas) is likely to be establishing that that it was reasonably foreseeable that a person of normal fortitude would suffer from such a recognised psychiatric illness as a result of the posting of images in this way.<sup>377</sup> If this obstacle can be overcome it is possible that the other elements of a negligence action (breach of duty and damage) would be made out.

*(e) Information Privacy Legislation*

The *Privacy Act* will not apply to the individual or group who authors the blog, as the Act does not apply to private individuals acting in a personal capacity. However, the Act may apply to the blog hosting service, 'Dodgee', although this is not straightforward.<sup>378</sup>

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<sup>375</sup> Note, however, that in *Ettingshausen* (1991) 23 NSWLR 443, 445 and 449 it was accepted by Hunt J that the publication of the photograph of the naked plaintiff gave rise to an imputation, capable of being defamatory on the basis of the ridicule test: namely that the plaintiff 'was a person who had his genitals exposed in a magazine of wide readership.' This imputation involved no suggestion of 'moral turpitude' on the part of the plaintiff: at 449. Similarly, therefore, it could be argued that the boys would be exposed to ridicule by virtue of the fact that their image appears on a gay voyeuristic website. Nevertheless, it seems doubtful that such imputations would, in any event, survive the truth defence.

<sup>376</sup> Referring to Spigelman CJ in *Naidu* (2007) 71 NSWLR 471 [76].

<sup>377</sup> Note also, in the six jurisdictions specifying a 'normal fortitude test' for mental harm, or pure mental harm, a relevant consideration in establishing what the defendant ought to have foreseen will be the existence of a pre-existing relationship between the defendant and the plaintiff: *Civil Liability Act 2002* (WA) s 5S(1); *Civil Law (Wrongs) Act 2002* (ACT) s 34(2); *Civil Liability Act 2002* (NSW) s 32(2); *Civil Liability Act 1936* (SA) s 33(2); *Civil Liability Act 2002* (Tas) s 34(2); *Wrongs Act 1958* (Vic) s 72(2).

<sup>378</sup> The *Privacy Act* does not apply to organisations with an annual turnover of less than \$3 million in the previous financial year: *Privacy Act* ss 6C, 6D (unless they handle certain types of information or are a health service provider; *Privacy Act* s 6D(4)). However, as Dodgee and its servers are located overseas the *Privacy Act* may not apply in any event — see above n 158.

If the *Privacy Act* does apply to ‘Dodgee’, that organisation will need to comply with the APPs in relation to its collection or receipt of personal information.<sup>379</sup> Where personal information is held in a ‘record’, that personal information must also be used and stored in accordance with the APPs.<sup>380</sup>

There is a preliminary question as to whether the photograph of the rowers can be said to constitute personal information *about* each of them within the meaning of the *Privacy Act*. However, the OAIC has confirmed that an image can be about an individual even if it depicts others as well. More pertinent is the question of whether the individuals in question are identified in the photograph, or reasonably identifiable from it.<sup>381</sup> This will depend in part on what is revealed of the boys’ faces, and whether the boys are identified or reasonably identifiable from the context, for example, the name of the school appearing on clothing; or perhaps the linking of the photographs with the boys names on the original website from which the photographs have been copied. Because the photograph is a group photograph it might be more difficult to establish that each and every individual is identified or reasonably identifiable.<sup>382</sup>

On the assumption that ‘Dodgee’ is bound by the *Privacy Act* and the photograph constitutes personal information about one or more of the boys, ‘Dodgee’ may have contravened principles relating to the collection (or receipt) of information by fair and lawful means.<sup>383</sup> This is because the photograph has been copied without the permission of the copyright owner. Therefore, if ‘Dodgee’ is notified of the breach of copyright and refuses to remove the image within a reasonable time, it could be considered to be in breach of the APPs. For similar reasons to those outlined in Case Study Two (Tim), it is unlikely that the use of the photograph would contravene other APPs unless the photograph constitutes ‘sensitive information’. As to that, the photograph in itself is not likely to be considered sensitive information, but if text is added to the photograph that suggests (for example) that the boys are homosexual, this would be information about a sexual preference and therefore ‘sensitive information’, even if untrue.<sup>384</sup> In this case, the APPs stipulate that sensitive information should not be collected (or, if it is received,

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<sup>379</sup> Refer to the definition of ‘collect’ and ‘record’ in *Privacy Act* s 6(1) and see Chapter Three, Part Three (Federal Information Privacy Laws) 148-149.

<sup>380</sup> An entity ‘holds’ information only if the entity has in its possession or control a record containing the personal information: *Ibid*.

<sup>381</sup> *Privacy Act* s 6(1) (definition of ‘personal information’).

<sup>382</sup> Note that the OAIC has expressed a view is that an image made publically available (such as an image placed online) can be considered personal information where the person or persons depicted are identified or reasonably identifiable to a member of the public with access to the image. However, the OAIC has also stated that it believes this may not be the case unless the section of the public able to identify the person is sufficiently broad and that, for example, a photograph of someone’s house is not personal information just because neighbours, family and friends are able to associate the house with a particular individual as this group is not sufficiently broad: Telephone Conversation with Carl, OAIC Enquiry Officer (2 September 2015).

<sup>383</sup> *Privacy Act* sch 1, APPs 3.5, 4.1. However, this begs the question as to whether the blog hosting service can be said to have collected or even received personal information, as to which see Bunn, above n 67.

<sup>384</sup> *Ibid* s 6(1) definition of ‘personal information’ and definition of ‘sensitive information’.

retained) unless consent of the person to whom it relates is provided.<sup>385</sup> If this is the case and the blog hosting service is notified that the photograph has been collected or received without consent, a failure to remove the photograph from the blog within a reasonable time could contravene the APPs and constitute an interference with privacy under the *Privacy Act*.

Nevertheless, the boys depicted have no standing to bring an action directly against 'Dodgee' for breach of the *Privacy Act*,<sup>386</sup> and even if 'Dodgee' itself has contravened the APPs, enforcement of an action against them is fraught with difficulty, given that they are located offshore.

*(f) Enhancing Online Safety for Children Legislation*

Given that the photograph is of a group of boys, it is unclear whether the photograph would meet the definition of 'cyberbullying material *targeted at an Australian child*' (emphasis added).<sup>387</sup> In any event, the material will not likely be considered, by the ordinary reasonable person, as intended to have an effect on any particular child<sup>388</sup> given that the purpose of displaying the image was for the gratification of those accessing the image. Accordingly, the complaints and removal scheme under the *Online Safety Act* will not apply.

*(g) Contract/Internet Content Regulation/Industry Regulation*

It is not clear whether the photograph would be considered 'prohibited' or 'potentially prohibited' content, based on criteria outlined in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), the National Classification Code and the Guidelines for the Classification of Films and Computer Games 2005. This is because the photograph itself is not offensive or explicit. SCAG does note in its 2005 report that an image that is not inherently offensive may be classified as prohibited if the URL of the website upon which the image is posted is offensive. One difficulty here, referred to by SCAG, is that the Classification Board is only able to take into account the 'context visually apparent with the image of the child'.<sup>389</sup> Thus, SCAG reports, even if a photograph appears with a link

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<sup>385</sup> Ibid APPs 3.3, 3.4 and 4.1.

<sup>386</sup> *Austen v Civil Aviation Authority* (1994) 50 FCR 272, 278, above n 76.

<sup>387</sup> The *Online Safety Act*, s 5(1) provides that material meets the definition of cyber-bullying targeted at an Australian child if it is provided on a social media service or relevant electronic service and 'an ordinary reasonable person would conclude that: (i) it is likely that the material was intended to have an effect on a particular Australian child; and (ii) the material would be likely to have the effect on the Australian child of seriously threatening, seriously intimidating, seriously harassing or seriously humiliating the Australian child.' While this does not rule out images of a group, it may be more difficult to establish that the material was 'intended to have an effect on a particular Australian child'. The Explanatory Memorandum to the Enhancing Online Safety Bill does not clarify the position further vis-à-vis groups of individuals although does not state: 'The requirement that the material was "intended to have an effect on the Australian child" ... is designed to exclude material of a general nature, such as material targeted at a broad class of people': Explanatory Memorandum, Enhancing Online Safety for Children Bill 2014, 67.

<sup>388</sup> Within the meaning of *Online Safety Act*, s 5(1).

<sup>389</sup> SCAG, above n 374, 22 [94].

titled 'more pics' (where the link was to a site containing child pornography) where neither the photograph itself nor the title of the link are offensive, the content of the linked web page cannot be taken into account.<sup>390</sup>

Even if the photograph was considered prohibited or potentially prohibited, the e-Safety Commissioner is unable to direct the blog hosting service to remove the content from the internet, as it is not hosted in Australia. Accordingly, the e-Safety Commissioner would need to notify suppliers of approved filters or, if a view is taken that the content is sufficiently serious (unlikely), notify law enforcement agencies in the relevant jurisdiction.<sup>391</sup> In the case at hand it may be that the likelihood of it being classified as prohibited or potentially prohibited is very low.<sup>392</sup>

It is possible that the blog hosting service, if reputable, would agree to delete the image if it were found to contravene its own terms and conditions. However, the boys have no contractual basis on which to require 'Dodgee' to delete the image.<sup>393</sup>

#### *(h) Criminal Offences*

Given that the image in this scenario is not inherently indecent or offensive, nor captured in circumstances involving an intrusion into privacy or the use of a surveillance device, and as it does not involve an intention to create fear or apprehension, the application of the criminal law to this situation is limited.<sup>394</sup> It is, however, possible that the federal offence of using a carriage service 'in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'<sup>395</sup> would be made out on the facts. There may be limited application of a number of state-based criminal offences.<sup>396</sup>

#### *(i) Summary of the Legal Position for Case Study Seven*

In summary, the boys are unlikely to succeed in an action for invasion of privacy as the photograph itself was taken in a public place, initially published online with consent, and reveals nothing inherently private or offensive. However, there is a small chance that the context of its use may persuade courts that the boys had a reasonable expectation of privacy in relation to the use of the photograph on the blog. The information

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<sup>390</sup> Ibid

<sup>391</sup> See Chapter Three, Part Three (Regulation of Content under the Broadcasting Services Act) 154.

<sup>392</sup> See Electronic Frontiers Australia, Submission to SCAG, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper (2005), 14 October 2005, 5.1.1 [31].

<sup>393</sup> As Dodgee is located in Eastern Europe it might be possible for the boys to complain to the relevant Data Protection Authority or other authorities in the jurisdiction in which Dodgee is located, if the publication of the image would be considered a contravention of any local data protection or other laws.

<sup>394</sup> See Chapter Three, Part Three (Criminal Law) 158.

<sup>395</sup> *Criminal Code Act 1995* (Cth), s 474.17. A number of other provisions of the *Criminal Code Act 1995* (Cth) cover offences involving a carriage service, including using a service to make threats to kill or cause serious harm (s 474.15).

<sup>396</sup> For a detailed consideration of the application of various criminal offences extant in 2005 to the unauthorised taking and publication of photographs of schoolboys on websites, refer to SCAG, above n 374, Appendix One.

communicated by the photograph is not confidential or defamatory and an action for intentional or negligent infliction of harm is likely to fail, either because there is no relevant harm or, where there is, because the requisite intent to cause that harm, or the reasonable foreseeability of it, is not made out.

The *Privacy Act* will not apply to the individual or individuals who author the blog (even if they are identifiable from their pseudonyms) although it may apply to the blog hosting service itself. Even if this is the case, and the hosting service is determined to be in breach of the APPs, enforcing the Act against the content host is likely to prove difficult, given that they are located outside of Australia. The photograph is not likely to be classed as cyberbullying material targeted at an Australian child under the *Online Safety Act*, nor prohibited content under the *BSA*.

## H Case Study Eight (Harry)

### 1 Scenario

Harry is 14 years old and in Year 9 of High School. He has a few friends at school but is neither especially popular nor unpopular. Harry is very ‘tech-savvy’, and has had his own mobile phone since starting High School at the age of 12. He loves taking ‘selfies’, either of himself alone or of himself with friends, but he does not post these pictures online. Harry’s father is a senior federal Police Officer and Harry has been brought up with a strong sense of how important it is to guard his own privacy and to be careful about the amount of identifying information that is available online. Moreover, Harry is very image conscious and does not like anyone else taking pictures of him without his permission. He is dismayed and frustrated, therefore, to find that a fellow student has taken a picture of him waiting at the school bus stop, and uploaded it to Instagram. There is nothing inherently embarrassing or revealing about the image.

### 2 Background and Key Features

This is a hypothetical scenario, although Harry is based on a 14-year-old boy known to the author who, like Harry and for similar reasons, does not like anyone else taking or using his photograph without his express permission.

A key feature of this scenario is that, unlike a number of the other scenarios included in this chapter, it is probably more difficult for an objective bystander to understand why Harry is concerned about the use of his image, given that there is nothing revealing, intimate or embarrassing about it. In Case Study Two (Tim), for example, the objective bystander can probably sympathise with the effect of publication of Tim’s image on his already low self-esteem, given the nature of the image in that case. By contrast, Harry’s dismay and frustration do not necessarily stem from the nature of the image at all, but rather from his own attitudes towards having his image taken and published online. Those attitudes, in turn, arise from his upbringing as well as his personality. In Harry’s case,

publication of the image will not necessarily have a directly negative impact on his self-esteem — Harry is described as dismayed and frustrated, rather than distressed, embarrassed and humiliated. Nevertheless, as was explained in Chapter Two, the extent to which an individual can control access to themselves (and, by extension, personal information about themselves) is itself a source of feedback about that individual's relational value and, in that sense, may impact upon self-worth or self-esteem.<sup>397</sup>

### 3 *Discussion of the Law*

#### *(a) Action for Invasion of Privacy*

A common law action for invasion of privacy would not be available to Harry. The image itself does not convey private information or capture a private activity or moment, and neither was it captured in circumstances involving an intrusion into seclusion. As discussed above, however, in developing a common law action for invasion of privacy, courts may be prepared to find that a reasonable expectation of privacy can arise due to the context in which an image is used. However, a relevant factor in determining whether there is an expectation of privacy in relation to the particular use of an image is the extent to which that use would be considered offensive to a reasonable person. Here there is nothing about the image or the context in which it is used to suggest that it would be offensive to a reasonable person. Moreover, Harry's particular sensitivities regarding the capture and use of his image are largely irrelevant in assessing whether publication would be regarded as offensive, as the test is objective.<sup>398</sup> Even if Harry could establish a reasonable expectation of privacy — highly unlikely — the other elements of the action would not be made out, for similar reasons to those given in relation to Case Study Two (Tim).

#### *(b) Confidential Information*

The photograph of Harry reveals no information of a private or confidential nature. Harry was in a public place at the time that the image was captured and the information conveyed by the photograph — how Harry looks standing at the bus stop — will not be regarded as information that is relatively inaccessible (outside the public domain). In addition, the image does not convey private information and Harry would have no reasonable expectation of privacy in relation to the publication of the photograph. A breach of confidence action is not available to Harry.

#### *(c) Defamation*

As the photograph of Harry at the bus stop conveys no imputations that would be regarded as defamatory, this action is unavailable.

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<sup>397</sup> See Chapter Two, Part Four, Section C (Control over Image as a Reflection of Relational Value and Autonomy).

<sup>398</sup> Albeit the question should be considered from the perspective of a reasonable person in the position of the plaintiff.

*(d) Intentional or Negligent Infliction of Harm or Harassment*

Harry has not suffered any recognised psychiatric injury as a result of the capture and publication of his photograph so an action for intentional or negligent infliction of harm, and an action for harassment, is unavailable.

*(e) Information Privacy Legislation*

The *Privacy Act* does not apply to the acts or practices of individuals acting in a personal capacity and so will not apply to the individual who took and uploaded Harry's photograph.

The photograph has been uploaded to Instagram. That organisation belongs to Facebook<sup>399</sup> and the application of the Australian privacy laws to Facebook has been discussed in the context of Case-Study Two (Tim). The photograph of Harry does not constitute sensitive information, however, so even if Instagram is bound by the APPs, the existence of Harry's photograph on the site is most unlikely to contravene those principles. As such, Harry will not have grounds to complain to the OAIC.

*(f) Enhancing Online Safety for Children Legislation*

The photograph of Harry does not constitute cyberbullying material targeted at an Australian child<sup>400</sup> so Harry has no grounds upon which to complain to the e-Safety Commissioner.

*(g) Contract/Internet Content Regulation/Industry Regulation*

Harry could request that his image be removed from Instagram. However, given that the photograph does not contravene any of Instagram's terms and conditions, any such request would be unlikely to meet with success.

*(h) Summary of the Legal Position for Case Study Eight*

Although Harry is dismayed and frustrated at having an image of himself captured without his consent, it is most unlikely that any legal remedy will be available to him. Harry will probably be unable to establish a reasonable expectation of privacy in relation to the capture and/or publication of the image so an action for invasion of privacy would not succeed. Neither does the image reveal anything confidential or private in respect of which a breach of confidence action could be established, nor convey anything defamatory for the purpose of an action in defamation.

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<sup>399</sup> Vanessa Page, 'The Top 10 Companies Owned by Facebook' *Investopaedia*, 18 May 2015 <<http://www.investopedia.com/articles/personal-finance/051815/top-11-companies-owned-facebook.asp>>.

<sup>400</sup> In order to fall within the definition of cyberbullying material targeted at an Australian child, material must be such that an ordinary person would conclude that 'it is likely that the material was intended to have an effect on a particular Australian child' and the material would be likely to have the effect on the child of 'seriously threatening, seriously intimidating, seriously harassing or seriously humiliating' that child: *Online Safety Act* s 5.



Harry has not suffered from any recognised psychological injury — hence an action for intentional or negligent infliction of harm, or harassment, is also unavailable.

The *Privacy Act* does not apply to the individual who took or uploaded the photograph and, were it to apply to Instagram, a contravention of the APPs has probably not occurred. Given that the image does not constitute cyberbullying material targeted at an Australian child, and otherwise does not appear to contravene Instagram's terms and conditions, a request for removal of the image from Instagram is also unlikely to succeed, and could not be enforced.

## V CHAPTER SUMMARY AND CONCLUSIONS

This chapter has considered how Australian law would apply in respect of eight different scenarios and has focused mostly on the availability of civil remedies as well as the application of the *Privacy Act* and, to some extent, the application of codes of ethics or terms and conditions governing internet content hosts.

It has often not been possible to draw firm conclusions about the legal outcome in each scenario. In the case of an action for invasion of privacy, the existence of the cause of action is not firmly established and thus not only are the elements of the action necessarily speculative but there are also a number of unresolved questions as to how the likely elements of the action would in fact be applied by the courts. The same applies in relation to the action for breach of confidence, which, although of long history,<sup>401</sup> can nevertheless be said to be in something of a transition phase perhaps best summed up in the words of the question posed by Richardson et al: 'Where is the doctrine of breach of confidence now?'.<sup>402</sup> In other cases this is because the outcome will depend on particular facts that have not been described. Nevertheless, tentative conclusions have been drawn as to whether the image subject in each scenario would be likely to establish a cause of action or obtain legal redress via other means for the online publication of their image, either generally or in a particular context.

It is possible to say with some certainty that various private law causes of action will be open to Jackie (Case Study One) in respect of the use or threatened use of her images by Lenin. Here the use or threatened use of Jackie's images against her wishes would constitute a breach of confidence. If Australian courts were prepared to recognise an action for invasion of privacy at common law, Jackie is likely to satisfy the elements of the action. If Jackie suffers psychiatric harm as a result of the threats or use of her image, she will also likely have an action for intentional infliction of harm or harassment.

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<sup>401</sup> Megan Richardson et al, *Breach of Confidence: Social Origins and Modern Developments* (Edward Elgar Publishing, 2012) 17, writing that the doctrine was given shape by the case of *Prince Albert v Strange* (1849) 1 H & TW 1; 47 ER 1302, albeit that its origins cannot be traced back to a seminal case.

<sup>402</sup> Ibid 144.

In all of the other case studies set out in this chapter, a private law cause of action is far less likely.

In terms of an action for invasion of privacy, none of the other scenarios involve images that convey information that is inherently private, or that were captured in circumstances involving an intrusion into a private space (seclusion). Given that, the image subjects will succeed only if courts are prepared to accept that a reasonable expectation of privacy can attach to the publication or use of an image in a particular context, albeit that the information communicated is not inherently private and the circumstances in which the image was captured did not involve an intrusion into seclusion. There is limited judicial authority suggesting that courts may be prepared to take this route —although it may be that this is more likely where the plaintiff is a child — but unless a common law action for invasion of privacy becomes well enough established, lower courts are very unlikely to create one on the back of ‘difficult’ facts such as those outlined in Case Studies Two to Eight.

The case of Alison Chang (Case Study Three) provided an example of an image being appropriated for commercial purposes.<sup>403</sup> It was shown that the mere fact of appropriation for pecuniary gain is unlikely (in itself) to create a reasonable expectation of privacy on the part of the image subject. This is so even where the use of the image is, as here, objected to on non-commercial grounds.<sup>404</sup>

The discussion around Case Studies Two to Eight also illustrated that even if the image subject was able to establish a reasonable expectation of privacy, the action would be unlikely to succeed on the basis that one or other of the elements of the tort were absent, or that the defendant had a public interest defence.

In terms of an action for breach of confidence, none of the case studies (with the exception of the first) involve clearly ‘confidential information’. In many cases this is because the information, even if it is not in the public domain, probably cannot be

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<sup>403</sup> Case Studies Five (Tyger and Lilly) and Six (Ben) both involved the use of images to illustrate news stories. Although news sites and commercial broadcasters operate for profit, Prosser writes that, in the United States where the tort of appropriation is developed, there must be a more direct connection between the use of the plaintiff’s identity and the generation of profit: Prosser, above n 197, 405. As such, it is unlikely that these situations could properly be described as appropriation, in the usual sense. The same is probably true for Case Study Seven (Schoolboy Rowers), although if the particular blog post using the image is only accessible behind a paywall, there may be an argument that there is a more direct connection and that this is also, therefore, an example of appropriation.

<sup>404</sup> As already noted above, the ALRC has expressly excluded from the form of its recommended statutory action for serious invasions of privacy the appropriation of images for commercial purposes, in so far as such an appropriation would not otherwise constitute an intrusion upon seclusion or the misuse of private information: ALRC, *Serious Invasions of Privacy*, above n39, 88 [5.73]. On the other hand, the NSWLRC has expressed the view that the use of a person’s name, identity, likeness or voice without authority or consent should properly be classified as an invasion of privacy where the harm suffered is mental distress rather than damage to commercial interests, and should be actionable: NSWLRC, *Invasion of Privacy*, above n 200, (2009), 15 [4.5].

regarded as 'confidential' because it does not depict a private activity or concern a private interest. However, even if the subjects of these case studies were able to establish that the information was 'private', that information would nevertheless not be regarded as confidential either because it is already in the public domain or because the person to whom it related (or a parent) had failed to take steps to protect its inaccessibility.<sup>405</sup> This illustrates a key difference between the range of interests capable of protection by an action for breach of confidence (at least in its traditional form) and the range of interests capable of protection by a full-blown privacy tort, which may allow for the protection of information that is in the public domain (such as how a person looks on a day-to-day basis), but nevertheless considered private (for example, because it was captured in circumstances involving an intrusion into seclusion or because the image subject was targeted on the basis of their celebrity status).<sup>406</sup> As such, the action for breach of confidence in Australia can be contrasted with the breach of confidence action in England and Wales. Whereas an action in England and Wales is capable of protecting private information that is, nevertheless, accessible, in Australia information is unlikely to be considered confidential where it is in the public domain. Conversely, in Australia even information that is inaccessible may yet be incapable of protection by an action for breach of confidence on the basis that it is not sufficiently 'private' — this is illustrated most starkly in Case Study Six (Ben). Another difference is that in England and Wales the requirement for a person to establish an obligation of confidence has all but disappeared in relation to private information; or, at least, an obligation will be said to arise where the defendant knew or ought to have known that the plaintiff had a reasonable expectation of privacy in relation to the information. In Australia, the need to establish an obligation of confidence has not fallen away, and neither can it be said with confidence that the obligation is satisfied where the defendant knew or ought to have known that the plaintiff had a reasonable expectation of privacy in relation to the use of the information. This is another reason why the image subjects in Case Studies Two to Eight are unlikely to succeed in establishing an action for breach of confidence.

In terms of an action for defamation, none of the image subjects in the case studies is likely to succeed in establishing that the images conveyed imputations that had the capacity to defame — although the facts do not always lend themselves to a conclusive answer here, as it may be that images that are accompanied by text or commentary would then be considered defamatory. In the case of Shabeeha (Case Study Four) it was noted that the doctored image presents her in a false light and it has been suggested that such cases are more properly dealt with by reference to the law of defamation. However, even though the image of Shabeeha may cause her to be thought less of (or shunned and avoided) among her own community, for the purposes of establishing an action in

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<sup>405</sup> That is, unlike the position that has been reached by the UK courts, where breach of confidence can be utilised to protect private information that is in the public domain: see, eg, *Weller* [2015] EWCA Civ 1176 (Lord Dyson, Master of the Rolls, with Lords Justice Tomlinson and Bean in agreement).

<sup>406</sup> See, eg, *ibid* [63] (Lord Dyson, Master of the Rolls, with Lords Justice Tomlinson and Bean in agreement).

defamation it is likely that the defamatory capacity of the imputations will probably not be judged by reference to sectional attitudes among the Muslim family and community of which Shabeeha is part.<sup>407</sup> Given that Shabeeha also has no other action open to her, claims that the presentation of individuals in a false light are more properly dealt with by recourse to defamation law are unsubstantiated. Moreover, Chapter Three explained that where the subject is a child, it is often more difficult to establish a defamatory imputation.

Actions for intentional or negligent infliction of harm or harassment are unlikely to succeed on the facts of any of the Case Studies Two to Eight. This is primarily because the actions will not be made out unless a person suffers a recognised psychiatric injury and none of the case studies (with the exception of the first) suggest this is the case.<sup>408</sup> However, even if any of the image subjects in Case Studies Two to Eight has suffered from a recognised psychiatric injury, a likely stumbling block in each case is the need to prove that harm was actually intended or that that intention can be imputed to the defendant on the basis of something more than the fact that harm on the part of a person of normal fortitude was a foreseeable consequence of the unauthorised use of their image.<sup>409</sup>

In addition to the availability of a private law action, Jackie (Case Study One) may have grounds to complain to the OAIC if her image is posted onto YouTube and not removed within a reasonable time. The basis of the complaint would be that YouTube was in breach of the APPs by the collection or retention of personal information that is not reasonably necessary for one or more of that organisation's functions or purposes. However, it was noted in the discussion that there is some question as to whether the *Privacy Act* will apply to YouTube in any event and, if it does, whether images of Jackie would be considered 'personal information' by the OAIC. In each of the other case studies discussed, there is unlikely to be grounds for complaint about an interference with privacy under the *Privacy Act*, even vis-a-vis an internet intermediary that hosts the images (such as Facebook, YouTube and so on). This is either because the internet content host or the organisation responsible for collecting or using the information is not bound by the *Privacy Act* (or there is some question as to whether the organisation is bound); because there is doubt as to whether the images in question would be considered personal information; or because there is no breach of the APPs in any event. Nevertheless, given the many grey areas surrounding application of the *Privacy Act*, it is not always possible to give a clear-cut view as to whether or not the Act would apply to the organisation in respect of the information in question and whether, if it did, the organisation would be taken to have contravened any of the APPs. Even so, there are inherent limitations of the federal information privacy regime in providing individuals with a measure of control over their image — the lack of standing to bring an action for an interference with privacy on the part of individuals affected being one limitation, and another being the challenges of

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<sup>407</sup> See Mendelson, above n 278.

<sup>408</sup> See *Giller* (2008) 24 VR 1 above n154.

<sup>409</sup> See Chapter Three, Part Three (Intentional Infliction of Harm) 133-134.

enforcement vis-a-vis organisations without an Australian presence. Moreover, the fact that the *Privacy Act* does not apply to the acts and practices of individuals in a personal capacity means that it may be ineffective in deterring individuals from continually posting and reposting information that is (in the hands of the APP Entity hosting the content) considered an interference with privacy.<sup>410</sup>

In Jackie's case, the images of her if posted online would almost certainly be considered 'cyberbullying material targeted at an Australian child' under the *Online Safety Act*. If Lenin carries out his threat to upload the images to YouTube, Jackie could lodge a complaint to YouTube directly and, if that does not result in the take-down of the images within a reasonable time span,<sup>411</sup> Jackie can complain to the e-Safety Commissioner by utilising the complaints scheme established by the *Online Safety Act*. As YouTube is listed as a Tier 2 service, the e-Safety Commissioner can require the removal of the material from YouTube by issuing a notice to that service.<sup>412</sup> Upon receipt of such notice, YouTube would then be required to remove the videos within 48 hours or face consequences under the Act, which can include penalties, enforceable undertakings and injunctions.<sup>413</sup> The e-Safety Commissioner is also able to issue an end-user notice to Lenin, should the material be posted on YouTube, requiring him to remove it (among other things).

In all of the other case studies the image in question is unlikely to be considered 'cyberbullying material targeted at an Australian child'. As such, the regime introduced by the *Online Safety Act* will not assist any of those image subjects in removing their image from online publication.

In none of the case studies, with the exception of the first and possibly the seventh (Schoolboy Rowers), will the image posted online be considered prohibited content under the *BSA*. Nor is there any solid ground for complaint by reference to another regulator such as the Advertising Standards Bureau or ACMA. Moreover, other than in a few cases it is also unlikely that the internet content host with whom the image is published (YouTube, Facebook and so on) will agree to delete the image in question on the basis that it breaches its own terms of use. In Jackie's case, YouTube would be likely to delete any explicit images upon being notified of their publication. This is because the images breach YouTube's own terms of use. In relation to Shabeeha (Case Study Four) it is

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<sup>410</sup> However, internet content hosts do have the capacity to deal with this by reference to their own terms of service, which can prohibit individuals from posting material that is invasive or privacy, and which can allow the content to suspend an account of a repeat infringer. This is discussed further in Chapter Six in the context of recommendations for a law reform option involving amendment to the federal information privacy regime.

<sup>411</sup> The *Online Safety Act* provides that individuals may complain (under s 18) where images have not been removed within 48 hours following a complaint to the social media service 'or such longer time period as the Commissioner thinks fit'.

<sup>412</sup> Ibid s 35. The Commissioner must be satisfied that the material is 'cyberbullying material targeted at an Australian child' and that the other conditions specified in s 35 (such as prior lodgement of a complaint with the social media service under its complaints scheme) are met.

<sup>413</sup> Ibid ss 36, 46 (civil penalty provisions); s 47 (enforceable undertakings); s 48 (injunctions).

possible that Facebook would agree to delete the doctored photograph if Shabeeha could demonstrate that it was not authentic. In respect of the schoolboy rowers (Case Study Seven), the terms and conditions of the internet content host are not known, but if the publication of the image on its site contravened its terms, it may be prepared to remove the image in question.

It has been demonstrated that even where an image has been used for commercial purposes without the consent of the image subject, an action under the *ACL* is not likely to succeed. In the case of Alison (Case Study Three) this is because it is unlikely that there has been a commercially relevant representation. In Case Study Five (Tyger and Lilly) and Six (Ben), the images have been used by a news service, which, as an information provider, is not subject to the relevant provisions of the *ACL*.

None of the image subjects have grounds to bring an action for copyright infringement against the publisher as none of the subjects themselves would own the intellectual property in the photograph. In Case Study Five (Tyger and Lilly) — subject to any fair use exception that may apply — the mother may have grounds to bring an infringement action against the news service, assuming that it copied the image from her Facebook page without permission.

Finally, none of the case studies would give rise to criminal liability, with the exception of the first and possibly the seventh.

The scenarios therefore illustrate the limitations of Australian law in giving a child or young person control over their image, in the sense of having a private law action or other avenue of redress open to them. This is the case even where the image has been captured or used without the image subject's consent, and where the publication of the image online or its use in a particular context is unwanted and even harmful. As noted at the beginning of this chapter, these observations should not be taken as offering judgement about the claim for control. Neither do these observations equate to suggestions that the law *should* respond to provide a remedy to the image subjects in any or all of Case Studies Two to Eight above. The question as to whether Australian law should respond to provide a remedy in some or all of the situations illustrated in this chapter, and if so on what basis, is the subject of the following two chapters.



# CHAPTER FIVE – THE NEED AND JUSTIFICATION FOR LAW REFORM

## I INTRODUCTION

The previous two chapters illustrated the gaps in Australian law in terms of providing individuals with control over the capture and use of their image by others. For children and young people these gaps are significant given the potential impact on development, outlined in Chapter Two, as a result of the unwanted online publication of images or their subsequent use. This chapter considers whether a legal response is required to address the problem of the unwanted posting of images online or their subsequent use and, if so, what might be a justificatory basis for that response. The former question is approached by considering Lessig's four 'modalities' that regulate cyberspace.<sup>1</sup> The second question is approached from a rights-based perspective by considering Australia's commitment to children's rights as set out in the *CRC* and by examining the particular rights enshrined within it. The nature of any legal response and how it might achieve an appropriate balance between respective rights is not considered in this chapter, but is the subject of the next.

## II CHAPTER OUTLINE

The discussion part of this chapter (Part Three) begins, in Section A, by explaining Lessig's four 'modalities' that regulate cyberspace: law, norms, architecture and the market. This section then considers whether, in view of the gaps in the law identified in Chapters Three and Four, it is sufficient to rely on one or more of the other modalities of regulation in order to fill those gaps and address the problem of unwanted online posting of images of children or their subsequent use. This section of the chapter concludes that it is not sufficient to rely on norms, architecture or the market and that a legal response is necessary.

Part Three then moves on, in Section B, to consider the justificatory basis for a legal response to the problem of the unwanted online posting of images or their subsequent use in light of the risks of harm associated outlined in Chapter Two. That section suggests that one or more of the rights set out in the *CRC* provides that basis. Before considering specific rights under the *CRC*, a brief background on the *CRC* and its status in Australian law is provided, along with a brief consideration of some of the criticisms levelled against it. The sections following that discuss two of the *CRC*'s core principles — the best interests principle and the right of the child to be heard — before going on to consider the right to privacy, the right to development and the right to freedom of expression.

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<sup>1</sup> Lawrence Lessig, *Code Version 2.0* (Basic Books, 2006) 125.



This chapter focuses on the right of privacy and of development as rights that, taken together or individually, can provide the justificatory basis for a legal response to the issue of the unauthorised posting of images online. This is not to suggest that these are the only rights capable of providing that justificatory basis. Other rights, such as the right to identity (in Article 8) or the right to protection from violence (Article 19), could also provide at least something of a justificatory basis for a legal response to that issue.<sup>2</sup> Nevertheless, given that the harms focused on in Chapter Two are developmental harms, and that the issue of the unauthorised publication of images can be considered as a privacy issue,<sup>3</sup> focus is directed on the right to privacy and the right to development. Other rights — the best interests principle and the right of the child to be heard — are discussed because they are important core principles of the *CRC*. The right to freedom of expression is also briefly considered, particularly because it is this right that is probably most affected by any legal response to the issue of the unauthorised online publication of images.

Following the main discussion in Part Three, this chapter then moves on, in Part Four, to summarise the findings of the chapter.

### III DISCUSSION

#### A *Lessig's Four Modalities that Regulate Cyberspace*

When considering how 'cyberspace' is regulated, Lessig urges us to consider four distinct yet interdependent modalities, or constraints: law, norms, architecture and the market.<sup>4</sup> These four modalities not only regulate cyberspace but act as constraints on behaviour in general.<sup>5</sup>

Lessig recognises that in addition to law in the sense of commands backed up by sanctions, law can command behaviour or reflect societal values (for example, by stipulating that

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<sup>2</sup> In relation to the right of identity, see, eg, Noberto Nuno Gomes de Andrade, 'Oblivion: The Right to be Different ... from Oneself: Reproposing the Right to be Forgotten' (2012) 13 *Revista D'Internet, Dret i Política* 122. While not writing specifically about the right to identity in the *CRC*, de Andrade has defined the right to identity as a right to have the 'indica, attributes or the facets of personality which are characteristic of, or unique to a particular person (such as appearance, name, character, voice, life history, etc.) recognized and respected by others': at 125. de Andrade also refers to Italian jurisprudence as adding another dimension to the right of identify, which 'concerns the correct image that one wants to project in society': at 125. In relation to the right to protection from violence in article 19, this right can provide justification for laws that target sexual exploitation and cyberbullying as well as protection against exposure to harmful online content: see, eg, Child Rights International Network, *Towards a Charter for Children's Rights in the Digital Context*, Submission to Committee on the Rights of the Child, Day of General Discussion 'Digital Media and Children's Rights', 12 September 2014, 5. See also, generally, Livingstone, Sonia and Brian O'Neill, 'Children's Rights Online: Challenges, Dilemmas and Emerging Directions' in Simone van der Hof, Bibi van den Berg and Bart Schermer (eds) *Minding Minors Wandering the Web: Regulating Online Child Safety* (Springer, 2014 (24)) 19.

<sup>3</sup> See, eg, ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 3, 2296 [69.5]; Saad [2012] NSWSC 1183 (4 October 2012); Hosking [2005] 1 NZLR 1.

<sup>4</sup> Lessig, above n 1, 123–4.

<sup>5</sup> Ibid 123.

certain days should be public holidays), constitute or regulate governmental structures, and establish individual rights.<sup>6</sup> Reference to 'norms' is to social norms that constrain behaviour 'not through the organized or centralized actions of a state, but through the many slight and sometimes forceful sanctions that members of a community impose on each other.'<sup>7</sup> The market, according to Lessig, typically regulates through price<sup>8</sup> and although the market exists in a broader context of law and norms it 'still constrains in a distinct way'.<sup>9</sup> Examples of market-based constraints in a cyberspace context include constraints on access due to pricing, the greater revenue from advertising for popular sites and the abandonment of low-population forums by online service providers.<sup>10</sup> Lessig's reference to architecture is, in the broadest sense, a reference to the way things are designed and structured, as well as to the inherent nature of things — the way things are.<sup>11</sup> In the context of cyberspace, architecture should be thought of as its 'code' or 'the instructions embedded in the software or hardware that makes cyberspace what it is.'<sup>12</sup>

### 1 *Considering the Four Regulators in the Context of the Risks of Developmental Harms Outlined in Chapter Two*

The following sections consider each of Lessig's four regulators and the extent to which each of them is able to address the problem of the unwanted online posting of images or their subsequent use. There are undoubtedly various ways in which the problem might be addressed, such as by giving image subjects the ability to call for the removal ('take-down') of images posted by others without their consent; by preventing or restricting the capturing of images; or by operating to change behaviours around the taking or posting of images.

#### *(a) Law*

Chapters Three and Four illustrated the limitations of Australian law in giving a child or young person control over their image, in the sense of having a private law action or other avenue of redress open to them. That is not to say that there is no control, but that the constraints on the online publication and use of online images, even when that publication or use is unwanted and/or harmful to the individual is incomplete. In particular, children are only able to effect the removal of an image from online publication in limited circumstances. This, in turn, is problematic because of the risks of developmental harm, outlined in Chapter Two, which arise to the insufficiency of control.

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<sup>6</sup> Ibid 340.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid 341.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid 124.

<sup>11</sup> Ibid 341.

<sup>12</sup> Ibid 121.

Might it be said, however, that the problem is adequately addressed by the operation of one or other modalities — namely relevant social norms, the market, or code? If this is the case then the creation of new laws would be unnecessary, or at least less pressing?

### *(b) Norms*

A number of studies have considered the influence of social norms on how one ‘behaves’ in the online environment.<sup>13</sup> For example, one recent study investigated the impact of young people’s perceptions of peer norms, as well as parental monitoring, on risky online behaviours, including the posting of personal details online and the uploading of offensive video clips.<sup>14</sup> The study found that peer injunctive norms are more influential on adolescents than the injunctive norms of parents.<sup>15</sup> These findings fit in more generally with social norms theory, which ‘emphasizes the powerful impact of friends on adolescent behaviour.’<sup>16</sup> It has also been suggested that social networking sites ‘may actually serve as a “media super-peer” by endorsing and establishing social and behavioural norms of an adolescent’s peers.’<sup>17</sup>

In terms of norms that operate specifically as constraints on the online disclosure of information about others, it can be difficult to identify any fixed or ‘entrenched’ norms given the relative novelty of the technology and information flows under consideration. For example, when considering norms around the disclosure of information about others on social networking sites,<sup>18</sup> it is relevant to consider that social networking only really established itself as a phenomenon in the early years of the 21<sup>st</sup> century.<sup>19</sup> Nevertheless, Nissenbaum has rejected claims that ‘social networking sites define a newly emergent, sui generis social context with its own internal rules’ and denies ‘that there are no entrenched

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<sup>13</sup> See, eg, Hagit Sasson and Gustavo Mesch, ‘Parental Mediation, Peer Norms and Risky Online Behaviour among Adolescents’ (2014) 33 *Computers in Human Behaviour* 32; Katherine Strater and Heather Richter Lipford, ‘Strategies and Struggles with Privacy in an Online Social Networking Community’ *BCS-HCI '08 Proceedings of the 22nd British HCI Group Annual Conference on People and Computers: Culture, Creativity, Interaction - Volume 1*, (British Computer Society, 2008) 111; Airi Lampinen et al, ‘We’re in it Together: Interpersonal Management of Disclosure in Social Network Services’ *CHI 2011 Session: Privacy* (Vancouver, Canada, 7–12 May 2011); Sonja Utz and Nicole C Krämer, ‘The Privacy Paradox on Social Network Sites Revisited: The role of Individual Characteristics and Group Norms’ 2009 3(2) *Journal of Psychosocial Research on Cyberspace*, article 1 <<http://www.cyberpsychology.eu/view.php?cisloclanku=2009111001>>.

<sup>14</sup> Sasson and Mesch, above n 13, 35.

<sup>15</sup> Ibid 37. Utz and Krämer have also noted the influence of peer norms on privacy behaviours in the context of social networking sites: Utz and Krämer, above n 13.

<sup>16</sup> Sasson and Mesch, above n 13, 37.

<sup>17</sup> Lisa M Cookingham and Ginny L Ryan, ‘The Impact of Social Media on the Sexual and Social Wellness of Adolescents’ (2015) 28(1) *Journal of Pediatric and Adolescent Gynecology* 2, 3.

<sup>18</sup> There are a number of different definitions of social networking and social networking sites: for a more detailed discussion see Katherine Sarah Raynes-Goldie, *Privacy in the Age of Facebook: Discourse, Architecture, Consequences* (PhD Thesis, Curtin University, 2012) 50–2. See also Malcolm Shore and Quinglan Zhou, ‘Second Life: The Future of Social Networking?’ in Maryam Purvis, Bastin Tony Roy Savarimuthu (eds), *Computer-Mediated Social Networking: First International Conference ‘Revised Selected Papers’*, ICCMSN 2008 (Dunedin, New Zealand, June 2008) 18, 19–21.

<sup>19</sup> Raynes-Goldie, above n 18, 52.

norms with which we need to contend.’<sup>20</sup> When considering the flow of information into online contexts such as social networking sites, Nissenbaum argues that it is important to consider whether that flow violates established context-relative informational norms.<sup>21</sup> If it does, it will be experienced as a violation of privacy (privacy being understood ‘neither as a right to secrecy nor a right to control but a right to *appropriate* flow of information’).<sup>22</sup> Raynes-Goldie has claimed that social networking sites violate contextual informational norms because they mix surveillance with social life.<sup>23</sup> In other words, although users are sharing information in the context of socialising, the information is being used for and transferred into other contexts unrelated to social activities.<sup>24</sup> Personal information uploaded to social networking sites, for example, can be used for marketing and other commercial purposes. As Shih has written:

New norms about sharing personal information on social networking sites are also providing companies with a wealth of audience data. Businesses are using this data to get a pulse on what people are saying, identify problematic issues, and reach precise audience segments with targeted ads.<sup>25</sup>

Moreover, information on a personal Facebook page may be used by employers to make employment decisions,<sup>26</sup> and information on a news website may be picked up and indexed by a search engine.<sup>27</sup>

The unauthorised online publication of images of others can be seen as a violation of entrenched informational norms, if those norms are understood in the terms described by Nissenbaum. Nissenbaum identifies relevant informational norms by reference to the context in which information was gathered, the information subjects, senders and recipients (referred to as ‘actors’), and the transmission principles that apply to the flow of information in that particular context.

Transmission principles are described as principles that express the ‘terms and conditions’ under which transfers of information should or should not occur.<sup>28</sup> Such principles can include implicit understandings as to how information will be treated, as well as legal or mandated obligations either to disclose or not to disclose certain information (such as

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<sup>20</sup> Helen Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford Law Books, 2010) 223.

<sup>21</sup> *Ibid* 140.

<sup>22</sup> *Ibid* 127 (emphasis in original).

<sup>23</sup> Raynes-Goldie, above n 18, 84.

<sup>24</sup> *Ibid*.

<sup>25</sup> Clara Shih, *The Facebook Era: Tapping Online Social Networks to Market, Sell and Innovate* (2011, Prentice Hall) 40.

<sup>26</sup> See, eg, Chapter 2, Part Six.

<sup>27</sup> As was the case in the facts underlying the European Court of Justice’s decision in *Google* (Court of Justice of the European Communities, C-131/12) Opinion of AG Jääskinen (25 June 2013) 1030 [18].

<sup>28</sup> Nissenbaum, above n 20, 145.

obligations of confidentiality).<sup>29</sup> Another important parameter in determining relevant informational norms is the attributes of the information in question, or the type and nature of the information.<sup>30</sup> Depending on the context, information of a certain nature may or may not be considered appropriate according to the relevant context-relative informational norms. By way of example, in the context of a job interview, information about an applicant's marital status is generally considered inappropriate where the same information in a different context, say courtship, would be considered appropriate.<sup>31</sup>

Determining the attributes of information also involves a consideration of the conditions under which information is accessible. Depending on the form in which information is made available (whether the information is digitised, placed online, or takes the form of words or images) and the access conditions that apply to the information (for example, whether it is available on a publically accessible website or is restricted to certain individuals or institutions), information can yield new information. One example, provided by Nissenbaum, is the placing of criminal records online with no access restrictions:

Records placed on the Web may easily be harvested en masse by institutional information aggregators that facilitate grand sweeps of public records databases for inclusion in data warehouses ... [O]nline records allow in-depth targeting of particular individuals with the possibility of short-circuiting much effort if one is willing to pay the fee charged by information providers for dossiers of interest.<sup>32</sup>

Another example might be the use of face recognition technology such as that employed by Facebook in respect of images uploaded to the social network site. Face recognition technology is behind Facebook's tag suggest feature, introduced in 2011. The technology and its use for tag suggest was described by the company as follows:

We currently use facial recognition software that uses an algorithm to calculate a unique number ('template') based on someone's facial features, like the distance between the eyes, nose and ears. This template is based on photos you've been tagged in on Facebook. We use this template to suggest tags to you when you're adding a new photo to Facebook ... Thus, when a new photograph of an individual in the 'face print' database is uploaded to Facebook, the facial recognition software is able to automatically suggest the name of the person in the new photograph.<sup>33</sup>

Given advances in technology that allow large-scale data mining, data aggregation and analysis, as well as the use of technology such as face recognition, there is arguably a change in the attributes of information in the form of an image any time that image is uploaded to the internet. There is also, very often, a broadening of the potential recipients

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<sup>29</sup> Transmission principles include other principles such as reciprocity (bidirectional flow) and entitlement: Ibid 145–7.

<sup>30</sup> Ibid 143.

<sup>31</sup> Ibid 144.

<sup>32</sup> Ibid 218–19.

<sup>33</sup> Facebook, *Tagging Photos* <<http://www.facebook.com/help/463455293673370/>>.

of the information. This fact in and of itself does not render the information flow inappropriate because Nissenbaum recognises that novel flows may in fact ‘sometimes be “better” than those prescribed by existing norms.’<sup>34</sup> Nevertheless, if the flow of information into the online environment is considered by reference to entrenched context relative norms, it is apparent that there is usually a contravention of those norms simply on the basis of the change in attributes and actors (and often, also, due to changes in transmission principles).

On the other hand, there is evidence that *offline* social norms are gradually changing to reflect the realities of the digital world and the prevalence of internet use — particularly amongst the younger generation. Facebook founder and CEO Mark Zuckerberg, for example, has suggested that social norms have changed and that people are more open and less private.<sup>35</sup> Shih has written that ‘[t]he social Web is drastically changing how we communicate. Social norms are being invented about what, how frequently, and with whom we share even the smallest details of our lives.’<sup>36</sup> While these norms affect how people communicate online, they also tip over into offline forms of communication and practices. In relation to the practice of the taking of images of others, for example, the findings of the ALRC during its 2008 privacy inquiry are instructive:

Participants in the workshops accepted that it is often difficult to stop individuals from posting unauthorised photographs online. Some went so far as to say that anyone who poses for a photograph impliedly consents to its publication on the internet. One participant commented that the way to prevent online publication of your image was to ‘cover your face’. This suggestion received a negative reaction from people over the age of 25 with whom the ALRC consulted, and is indicative of the way in which young people are developing different norms around the use of the internet for communication purposes.<sup>37</sup>

If the posting of images of others is seen as being in line with developing informational norms, clearly those norms will not then operate to prevent the potential developmental harms outlined in Chapter Two. Moreover, there is some evidence that informational norms developing around the taking and online posting of images of others might in fact be related to a *mistaken* assumption that those who do not consent to their image being online can obtain adequate redress via the reporting mechanisms of social networking sites (in other words ‘the market’). It is worth here repeating the observation made by the ALRC in its 2008 report, as earlier set out in Chapter One:

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<sup>34</sup> Nissenbaum, above n 20, 15.

<sup>35</sup> See, eg, Bobbie Johnson, ‘Privacy No Longer a Social Norm, Says Facebook Founder’, *Technology, The Guardian* (online), 11 January 2010 < <http://www.theguardian.com/technology/2010/jan/11/facebook-privacy>>.

<sup>36</sup> Shih, above n 25, 32.

<sup>37</sup> ALRC, *For Your Information*, above n 3, 2234 [67.42].

Despite acknowledging the difficulties associated with the permanent removal of website content, most young people considered that an individual should be able to have a photograph removed from a website if he or she did not consent to its posting. This was seen as a suitable remedy to the unauthorised publication of a person's image, and was considered more practical than putting laws in place to prevent the initial posting. Participants in the workshops placed a significant amount of trust in the reporting mechanisms available on the major social networking websites, although none indicated that they had any experience using such mechanisms.<sup>38</sup>

As noted in Chapters Three and Four, while the reporting mechanisms of many major social media sites allow the operators to delete certain content, there is generally no obligation on the part of these operators to do so. In a submission to the ALRC's 2014 privacy discussion paper, the University of NSW Cyberlaw Centre writes:

Our colleagues at the National Children's and Youth Law Centre have reported frequently encountering difficulties in getting prompt and effective action in relation to online material that poses risks of serious intrusion on privacy for young people, especially if hosted in the Cloud or offshore.<sup>39</sup>

Ausloos has also suggested that individuals expect to have absolute control over their personal data but that this expectation may be 'merely a remainder of the pre-internet era'.<sup>40</sup>

If norms relating to the taking or online posting of images of others develop on the basis of mistaken assumptions as to the ease by which those images can subsequently be 'removed' or control over the images exercised, this suggests that greater education and awareness might, over time, lead to the creation of new norms. Indeed, the ALRC among others has highlighted the importance of education about the risks and consequences to self and others of online disclosures.<sup>41</sup> On the other hand, what must be said about social norms is that they rarely, if ever, operate as a perfect constraint on behaviour. While norms may impose sanction on 'deviant' behaviour, the sanction itself is unlikely to provide a complete deterrent. There will always be deviant behaviour. The same, of course, can be said about the law. However, there is — as Lessig points out — a relationship of interdependence between social norms and the law (as there is between each of the four modalities).<sup>42</sup> In particular, where social norms are developing rather than entrenched, as seems to be the case in the online context, law is an important factor in

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<sup>38</sup> Ibid [67.43].

<sup>39</sup> UNSW Cyberspace Law and Policy Community, Submission No 98 to ALRC, *Serious Invasions of Privacy in the Digital Era: Discussion Paper*, 12 May 2014, 8.

<sup>40</sup> See, eg, Jef Ausloos, "'Right to be forgotten' – Worth Remembering?" (2012) 28 *Computer Law and Security Review* 143, 148.

<sup>41</sup> ALRC, above n 3, 2243–6. See also Sonia Livingstone, 'Taking Risky Opportunities in Youthful Content Creation: Teenagers' Use of Social Networking Sites for Intimacy, Privacy and Self-Expression' (2008) 10 (3) *New Media & Society* 393, 407.

<sup>42</sup> Lessig, above n 1, 124.

influencing what norms develop (just as norms and expectations, of course, have a more or less direct influence on law<sup>43</sup>).<sup>44</sup>

(c) *The Market*

Cyberspace, it has been observed, is increasingly regulated by market forces. Ausloos has commented that the internet is ‘evolving from a practically entirely “free” network to a primarily commercial environment.’<sup>45</sup> The terms and conditions of internet content hosts operate similarly to the law in that they provide for constraints on behaviour, backed by sanctions (usually limited to the removal of material or, perhaps, the suspension of a user’s account or service).<sup>46</sup> Such terms and conditions can be expected to have a direct influence on the development of informational norms in the online contexts to which such terms apply.<sup>47</sup> However, these terms and conditions are more properly to be regarded as an incidence of regulation by the market, and the mechanisms that back-up the terms and conditions are to be regarded as ‘code’ or architecture.

The fact that many platforms and services are provided without charge to users should not mask the fact that users *are* in fact paying a price for using such services and platforms, with personal data as ‘the major currency’.<sup>48</sup> Facebook’s pictures, for example, have been described as its most ‘vital assets’.<sup>49</sup> When Rupert Murdoch purchased the social networking site MySpace, the purchase was described as bringing him ‘a gold mine of

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<sup>43</sup> A relevant example here is the reasonable expectations of privacy test: a ‘formula that features, either as the test, or as part of the test, of actionability in constitutional jurisprudence in the United States and Canada; in European human rights law; and in private law cases in England, New Zealand and the United States’: NSWLRC, *Invasion of Privacy*, Report No 120 (2009), 20 [5.4]. The reasonable expectations of privacy test has been described as ‘a reflection of contemporary societal values’: *Hosking* [2005] 1 NZLR 1, [250] (Tipping J), but also as a ‘normative judicial finding ... on ... the current demand for the legal protection of privacy and on whether the law ought to protect privacy in the particular circumstances’: NSWLRC at 21 [5.5]. Solove has argued that focusing only on people’s current expectations of (social norms around) privacy would over time erode the concept of privacy, given the level of surveillance which exists in the modern world: Daniel J Solove, ‘Conceptualising Privacy’ (2002) 90 *University of California Law Review* 1087, 1142.

<sup>44</sup> Indeed, when law mandates education in order to change social norms this is, as Lessig points out, an example of a legal constraint operating indirectly (rather than, say, directly by way of a sanction-backed constraint on behaviour): see Lessig, above n 1, 131.

<sup>45</sup> Ausloos, above n 40.

<sup>46</sup> See, eg, Facebook, *Statement of Rights and Responsibilities* (30 January 2015) <<https://www.facebook.com/legal/terms>> Term 14 Termination; YouTube, *Terms of Service* (9 June 2010) <<https://www.youtube.com/t/terms>> Term 7 Account Termination Policy; MySpace, *MySpace Services Terms of Use Agreement* (10 June 2013) <<https://myspace.com/pages/terms>> Term 2 (Term, Terms and Termination); Instagram, *Terms of Use* (19 January 2013) <<http://instagram.com/about/legal/terms/#>> Term 17.

<sup>47</sup> Interestingly, such terms and conditions are often expressed as if they are a reflection of community norms — Facebook’s terms, for example, include a set of ‘Community Standards’: see, eg, Facebook, *Facebook Community Standards* <<https://www.facebook.com/communitystandards>>. See also Raynes-Goldie, above n 18, 169: claiming that Facebook is actually bringing about a gradual change in privacy norms through its ‘small but persistent’ code changes.

<sup>48</sup> Ausloos, above n 40.

<sup>49</sup> Somini Sengupta and Kevin J O’Brien, ‘Facebook can ID Faces, but Using Them Grows Tricky’, *NYTimes* (online), 21 September 2012 <[http://www.nytimes.com/2012/09/22/technology/facebook-backs-down-on-face-recognition-in-europe.html?\\_r=0](http://www.nytimes.com/2012/09/22/technology/facebook-backs-down-on-face-recognition-in-europe.html?_r=0)>.



market research, a microscope into the content habits and brand choices of America's capricious youth market — not to mention millions of potential new customers for News Corp.'s Fox subsidiaries.<sup>50</sup>

Noting that the outlay incurred by media platforms in providing services at no cost to users will, in many cases, be recovered through advertising, the OAIC has observed that:

There is an inherent tension between this business model and the requirement to give individuals the ability to control, to the greatest extent possible, what happens to their personal information ... This tension will continue to challenge the traditional concepts of the regulation of the handling of personal information into the future.<sup>51</sup>

The OAIC's comment above suggests that rather than addressing the problem of unwanted online publication of images or their subsequent use, the advertiser-funded business model of a number of platforms is more likely to exacerbate the problem by encouraging users to share personal information, including images, about themselves and others. Moreover, it is difficult to see how there is any incentive for the market to provide a means of redress, prevention or mitigation in respect of the harms referred to in Chapter Two in the absence of either laws or social norms that constrain the sharing and unauthorised online posting of images. Moreover, it has been observed that the market has failed to adequately address even those harms arising from material that does violate social norms — such as cyberbullying material.<sup>52</sup>

In short, the market is unlikely to provide a solution, or even a partial solution, to the problem of unwanted online publication of images or their subsequent use, and may even contribute to the occurrence of the problem.

#### *(d) Code*

Finally, it must be considered whether 'code', or the design of particular platforms and online services, provides a solution or partial solution to the problem of unwanted online posting of images of children or their subsequent use. Given that the architecture of internet platforms is often initiated and shaped by the commercial interests behind them,<sup>53</sup> it seems again unlikely that the architecture of specific platforms will offer this solution. Then again, privacy policies and architecture are not necessarily determined solely by an organisation's drive for profit. Raynes-Goldie's thesis 'Privacy in the Age of Facebook' details how Facebook's privacy policies and design decisions are guided 'by a

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<sup>50</sup> James Verini, 'Will Success Spoil MySpace?' *Vanity Fair* (online), March 2006.

<sup>51</sup> OAIC, *Annual Report 2011–2012*, (2012) xiv.

<sup>52</sup> Explanatory Memorandum to Enhancing Online Safety for Children Bill 2015, Appendix D, 38.

<sup>53</sup> Although of course legal constraints may also have a bearing on how this architecture is shaped. Depending on the platform, individuals and groups quite separate from the platform host may have a degree of control over the information posted, for example, individuals who have their own blog or social networking profile make decisions about what to display and what to remove.

belief system which encourages “radical transparency”.<sup>54</sup> Van Dijck, writing in relation to Facebook and Linked-In, claims that

subtle adjustments of interface strategies over the years show how platforms deploy users’ needs for connectedness to stimulate lucrative connectivity, and how they push narrative forms to enhance the traceability of social behaviour. Social media profiles, in other words, are not a reflection of one’s identity, as Facebook’s Mark Zuckerberg wants us to believe, but are part and parcel of a power struggle between users, employers/employees and platform owners to steer online information and behaviour.<sup>55</sup>

The architecture of the internet can, of course, give individuals, including children, the ability to exercise some control over their personal information, including images. In a social networking context, for example, privacy settings can provide users with the ability to restrict the availability of the personal information and images they choose to put on their own sites. Depending on the platform used, individuals can choose whether this information is shared with the world at large, with friends or with a more limited audience.<sup>56</sup> Of course this option only applies to information that individuals have already chosen to post online and does not allow for control over information that others post. On the other hand, and as discussed in Chapter Two, Facebook’s photo tagging architecture is an example of code that provides individuals with an opportunity to be aware, at least, of what images are posted of them by others, and to choose whether or not to be identified by name (tagged) in such an image. Overall, however, code does not give individuals a means of removing from online publication images of themselves that have been posted by others, even without their consent. In some cases the architecture of certain applications may even thwart an individual’s wishes for anonymity. For example, in her thesis on digital identity, Davison notes that Google has recently launched a new image application that can ‘de-pixelate’ images and compare the image against internet data to reveal the true identity of the person whose features had been deliberately blurred. According to Davison, this is an ‘example of how technology acts on its own to change the initial way that information was originally shared on the Internet.’<sup>57</sup>

Of course platforms and system architecture can be designed differently. Code can change the way that things are. For example, Mayer-Scönberger has proposed a ‘code’ solution to the problem of the persistence of information in the online environment: namely the

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<sup>54</sup> Raynes-Goldie, above n 18, ii, citing Kirkpatrick (references omitted). Whether ‘radical transparency’ has become a social norm is debateable: see Raynes-Goldie at 71 and 72.

<sup>55</sup> José van Dijck, ‘You Have One Identity: Performing the Self on Facebook and LinkedIn’ (2013) 35(2) *Media, Culture and Society* 199, 212.

<sup>56</sup> Facebook, for example, allows posts to be made visible to anyone on Facebook, Friends, Family members of an audience customised by the individual user: see: Facebook, Facebook, *Data Policy* (29 September 2016) < <https://www.facebook.com/policy.php>>.

<sup>57</sup> Claire Davison, *Presentation of Digital Self in Everyday Life: Towards a Theory of Digital Identity* (PhD Thesis, RMIT, 2012) 236.

building in of digital expiry dates for personal data.<sup>58</sup> The advent of digital rights management ('DRM') technology to protect the interests of copyright owners<sup>59</sup> is another example of code changing how things are. Following on from their findings that posts made by individuals about others frequently failed or were unable to take into account the potential audience for the post, Litt et al proposed a number of design solutions to counteract the problem that posts about others might reach an unintended audience.<sup>60</sup> One possible solution, they suggested, was an audience cue feature that could allow the person posting information to see the potential visibility of it before it is posted.<sup>61</sup>

In reality, legal measures that aim to prevent, mitigate or provide redress for the developmental harms outlined in Chapter Two will almost certainly need to be supported by code in order to have practical effect. Code would be necessary, for example, to enable the verification of the identity of a person entitled to make a take-down request in respect of certain information or to enable the identification and removal of particular content.

## 2 Discussion

As noted above and in Chapters Three and Four, the right for an individual to call for the removal from online publication of a particular image (either generally or in a particular context) is only available in limited circumstances — where, for example, the image is defamatory or offensive or where it constitutes cyberbullying material targeted at an Australian child.<sup>62</sup> These limitations on control are problematic, in light of the potential for developmental harm arising from the unwanted online publication of an image or its subsequent use.

The previous sections then considered whether any of Lessig's other regulators — namely social norms, the market or code — could be relied upon to address this problem. A conclusion was reached that none of the other modalities could do so, and that a legal response was therefore necessary. That is not to say that a legal response is sufficient in itself, nor that it should be pursued in isolation. For one thing, the effective implementation and enforcement of laws often relies on voluntary cooperation by the private sector, particularly in the case of laws seeking to regulate online content.<sup>63</sup>

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<sup>58</sup> Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009).

<sup>59</sup> See, for example, Lessig above n 1, 116, 117.

<sup>60</sup> Eden Litt et al, 'Awkward Encounters of an "Other" Kind: Collective Self-Presentation and Face Threat on Facebook' (2014) *CSCW '14 Proceedings of the 17<sup>th</sup> ACM Conference on Computer Supported Cooperative Work and Social Computing* 449, 459.

<sup>61</sup> Ibid.

<sup>62</sup> See, eg, Chapter Three, Part Three.

<sup>63</sup> See, eg, Australian Federal Police, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, March 2014, 4, referring to enforcement challenges regarding the removal of online content hosted overseas and commenting: '[t]he AFP recognises the very good relationship it has with domestic and international industry partners who operate in the online environment. The AFP relies on the voluntary cooperation of international companies in support of law enforcement operations.' See, also, Frank La Rue, *Report of the Special Rapporteur on the Promotion and*

Moreover behavioural change may be brought about more effectively through a change in norms rather than through (direct) legal constraints. As the Australian Human Rights Commission remarked in its submission to the government's public consultation *Enhancing Online Safety for Children*, research carried out by the Commission in 2012 emphasised that the 'key driver of behavioural change among children and young people is peer support and educative approaches rather than simply legislative prescription.'<sup>64</sup> Finally, as noted earlier in this chapter, legal measures that aim to prevent, mitigate or provide redress for the developmental harms outlined in Chapter Two will almost certainly need to be supported by 'code' in order to have practical effect.

Given the conclusion reached here that a legal response is required to provide a partial solution to the problem of the unwanted online posting of images of children or their subsequent use, this chapter now moves on to consider the possible justificatory basis of any such response.

## B *The Convention on the Rights of the Child*

The *CRC* was ratified in 1989 and entered into force in 1990. To date the *CRC* is the most widely ratified of any international convention,<sup>65</sup> and has been described as unique due to the fact that it 'protects the broadest scope of fundamental human rights ever brought together within one treaty — economic, social and cultural, and civil and political'.<sup>66</sup> By ratifying the *CRC*, States Parties undertake to implement all the rights enshrined within it. In respect of civil and political rights, implementation is to be achieved by taking all 'appropriate legislative, administrative and other measures'.<sup>67</sup> In relation to economic, social and cultural rights, implementation is to be achieved by 'undertaking such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation'.<sup>68</sup> As noted in the Implementation Handbook on the Convention on the Rights of the Child ('Implementation Handbook'), neither the *CRC*

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*Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/HRC/17/27 (16 May 2011) [46]: 'F, and the Global Network Initiative serves as a helpful example to encourage good practice by corporations.'

<sup>64</sup> Australian Human Rights Commission, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 5 March 2014, 5.

<sup>65</sup> At the time of writing 193 States Parties have ratified the *CRC* with only Somalia and the United States being signatory parties that have not yet ratified it: United Nations Treaty Series, 'Chapter IV Human Rights: 11. *Convention on the Rights of the Child*', Status as at 20 January 2014: <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)>.

Nevertheless, the rights enshrined in the *CRC* cannot be said to have been universally accepted even among States Parties ratifying it, not least because there are a number of such parties who have ratified it subject to reservations that may be said to undermine the operation, in that country, of one or more substantive provisions of the *CRC*; or indeed to essentially undermine one of its objectives of the *CRC* or even to effectively nullify ratification: see William A Schabas, 'Reservations to the *Convention on the Rights of the Child*' (1996) 18 *Human Rights Quarterly* 472, 478. See also Rose D'Sa, 'The United Nations *Convention on the Rights of the Child*' [1993] May *Commonwealth Law Bulletin* 1274, 1280.

<sup>66</sup> Jan Martenson, 'Preface' in Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff Publishers, 1992) ix, ix.

<sup>67</sup> *CRC* art 4.

<sup>68</sup> *Ibid*.

itself nor the Committee on the Rights of the Child ('the Committee'), the body established under the *CRC* to monitor implementation of its obligations,<sup>69</sup> are explicit as to which articles include civil or political rights, or economic, social and cultural rights.<sup>70</sup> In fact it has been said that almost all the articles of the *CRC* include elements of civil or political rights.<sup>71</sup>

The *CRC* comprises 42 substantive articles,<sup>72</sup> four of which have been identified by the Committee as 'general principles':

- Article 2 (the principle of non-discrimination)
- Article 3(1) (best interests of the child to be the primary consideration in all matters concerning children)
- Article 6 (right to life and maximum possible survival and development)
- Article 12 (respect for the child's views in all matters concerning the child).<sup>73</sup>

These general principles are 'meant to help with the interpretation of the Convention as a whole and thereby guide national programmes of implementation.'<sup>74</sup> However, the

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<sup>69</sup> Ibid art 43.

<sup>70</sup> According to LeBlanc avoidance of this traditional classification is innovative and differentiates the Convention from most other human rights instruments: Lawrence J LeBlanc, 'The *Convention on the Rights of the Child*', (1991) 4(2) *Leiden Journal of International Law* 281, 288.

<sup>71</sup> Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3<sup>rd</sup> ed) 47; the Committee explains, in General Comment No 5: 'There is no simple or authoritative division of human rights in general or of Convention rights into two categories. The Committee's Reporting guidelines ... group articles 7–8, 13–17 and 37(a) under the heading 'Civil rights and freedoms', but indicate by the context that these are not the only civil and political rights in the Convention. Indeed, it is clear that many other articles, including articles 2, 3, 6 and 12 of the Convention, contain elements which constitute civil/political rights, thus reflecting the interdependence and indivisibility of all human rights. Enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights. ... [T]he Committee believes that economic, social and cultural rights, as well as civil and political rights, should be regarded as justiciable': Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child*, 34<sup>th</sup> sess, UN Doc CRC/GC/2003/05 (27 November 2003), 2 [6].

<sup>72</sup> Hodgkin and Newell, above n 71, xi (although scholars differ in their views as to the number of substantive articles: see Martin Woodhead, 'Early Childhood Development: a Question of Rights' (2005) 37 (3) *International Journal of Early Childhood* 79, 81 who refers to there being 41 substantive articles; and further Jim Lurie, 'The Tension between Protection and Participation – General Theory and Consequences as Related to Rights of Children, Including Working Children' (2003/2004) 7 *IUC Journal of Social Work Theory and Practice* 1, 1 referring to 40 substantive articles).

<sup>73</sup> Committee on the Rights of the Child, *General Comment No 5*, above n 71, 3–4 [12].

<sup>74</sup> Office of the High Commissioner for Human Rights, *The Rights of the Child*, Fact Sheet No 10 (Rev 1).

Implementation Handbook cautions that the *CRC* is indivisible and its articles interdependent,<sup>75</sup> and that no article of the *CRC* should be considered in isolation.<sup>76</sup>

The *CRC* applies to each and every child within the jurisdiction of the States Parties,<sup>77</sup> a child being defined as a ‘human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’<sup>78</sup> Although the *CRC* itself makes no provision for individual complaint or petition,<sup>79</sup> the UN General Assembly did approve, in 2011, a communications procedure (the ‘Third Optional Protocol’) by which children can submit complaints as to violations of a right or rights under the *CRC* (or under the Optional Protocols to it).<sup>80</sup> The Third Optional Protocol entered into force in April 2014, but at the time of writing Australia is yet to sign or ratify it.<sup>81</sup> There is also, as D’Sa notes, no provision for inter-state complaints within the *CRC*, and there are no specific sanctions within international law for non-compliance with the *CRC*’s provisions.<sup>82</sup>

## 1 *Status of the Convention on the Rights of the Child in Australian Law*

The *CRC* was ratified by Australia on 17 December 1990 and entered into force in Australia on 16 January 1991.<sup>83</sup> By ratifying the *CRC* Australia agreed to ‘undertake all legislative, administrative, and other measures’ for the implementation of the *CRC* rights.<sup>84</sup> As noted by Jones, the standards of the *CRC* are to be applied at all levels of government, and thus

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<sup>75</sup> Hodgkin and Newell, above n 71, xix. The principles of indivisibility and interdependence are applicable to human rights in general: Mary Robinson, ‘Human Rights at the Dawn of the 21<sup>st</sup> Century’ (1993) 15(4) *Human Rights Quarterly* 629, 632; Jack Donnelly, *International Human Rights* (Westview Press, 2012) 24. However, as Anthony has noted, the term ‘indivisibility’ while frequently employed by the United Nations in relation to human rights, has not been defined in any detail and there is ‘little consensus among commentators’: Dorothea Anthony, *Indivisibility of Human Rights: A Theoretical Critique* (LLB Thesis, University of Technology, Sydney, 2010) 7.

<sup>76</sup> Hodgkin and Newell, above n 71: the checklist for implementation of many of the articles of the convention cautions that the articles should not be considered in isolation — see, eg, the checklist for Article 5, 82.

<sup>77</sup> *CRC* art 2(1).

<sup>78</sup> *Ibid* art 1. The age at which childhood begins is not defined in the *CRC* and was a contentious issue during the drafting process: Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”* (Martinus Nijhoff, 1992) 26.

<sup>79</sup> LeBlanc, above n 70, 290; D’Sa, above n 65, 1275. Indeed, breach of treaty obligations are not justiciable by private Australian citizens in the absence of implementing legislation: *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270, 274 (Mason J). As to the lack of implementation of the *CRC* into Australian law see the section below on Status of the *Convention on the Rights of the Child* in Australian law.

<sup>80</sup> *United Nations Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature 28 February 2012, A/RES/66/138 (entered into force 14 April 2014).

<sup>81</sup> United Nations Treaty Series, ‘Chapter IV Human Rights: 11(d). *Optional Protocol to the Convention on the Rights of the Child* on a Communications Procedure’, status as at 21 September 2016: <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en)>.

<sup>82</sup> D’Sa, above n 65, 1276.

<sup>83</sup> United Nations Treaty Series, ‘Chapter IV Human Rights: 11. *Convention on the Rights of the Child*’, Status as at 22 April 2016: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

<sup>84</sup> *CRC* art 4. As noted above, Article 4 goes on to provide in relation to economic, social and cultural rights implementation is to be achieved by ‘undertaking such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.’

apply equally at the Commonwealth, state and territory level.<sup>85</sup> However, the act of ratification by Australia did not result in the *CRC* being automatically incorporated into Australian law<sup>86</sup> and to date Australia has not enacted legislation to incorporate its provisions wholesale into Australian law.<sup>87</sup> Nevertheless, according to the ALRC, Australia has ‘consistently asserted that the provisions of [the *CRC*] are fully implemented in the wide range of federal, State and Territory laws, programs and policies affecting children.’<sup>88</sup> Moreover, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires all Bills introduced into federal parliament to be examined by the Parliamentary Joint Committee on Human Rights and to contain a Statement of Compatibility with Human Rights.<sup>89</sup> This includes compatibility with the rights contained in the *CRC*.<sup>90</sup>

Although the *CRC* does not have direct effect in Australian law, it may have indirect effect in a number of ways. Firstly, indirect effect occurs through the interpretation of domestic legislation in accordance with the principle that in the case of ambiguity domestic legislation should where possible be given an interpretation that is consistent with Australia’s international treaty obligations.<sup>91</sup> Secondly, indirect effect comes about through the formulation of common law principles, which emphasise the importance of

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<sup>85</sup> Melinda Jones, ‘Myths and Facts concerning the *Convention on the Rights of the Child* in Australia’ (1999) 5(2) *Australian Journal of Human Rights* 126, 126.

<sup>86</sup> Treaties do not become part of Australian law unless specifically incorporated into domestic legislation: *Simsek v Macphee* (1983) 148 CLR 636; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Kioa v West* (1985) 159 CLR 550; *Dietrich v The Queen* (1992) 177 CLR 292; *J.H Rayner Ltd. v Department of Trade* [1990] 2 AC 418; *Re East; Ex parte Nguyen* (1998) 159 ALR 108.

<sup>87</sup> However, express reference to the *CRC* is made in the *Online Safety Act* s 12. As to the impact of incorporation (or non-incorporation) of international human rights law into domestic law generally (albeit with special focus on the United Kingdom), see generally Rosalyn Higgins, ‘The Relationship between International and Regional Human Rights Norms and Domestic Law’ (1992) 18 *Commonwealth Law Bulletin* 1268.

<sup>88</sup> ALRC, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [3.20] (references omitted).

<sup>89</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8(1)-(5), as cited in Australian Human Rights Commission, *Children’s Rights Report 2015 – National Children’s Commissioner* (2015) 41.

<sup>90</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3(1)(f).

<sup>91</sup> See, eg, *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ); *Dietrich v R* (1993) 177 CLR 292, 348–9 (Dawson J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, 362 (Mason CJ and Deane J) (‘Teoh’). See also *Acts Interpretation Act 1902* (Cth) s 15AB(2) which provides that in the construction of legislation regard can be had ‘to any treaty or other international agreement that is referred to in the Act.’ Note, however, that this will not apply where domestic legislation indicates a clear intention to the contrary: *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 38 (Brennan, Deane and Dawson JJ), and note also *Horta v Commonwealth* (1994) 181 CLR 183 whereby the consistency of domestic legislation with international law is not necessary for its validity.

ratified conventions.<sup>92</sup> Finally the provisions of the *CRC* can be given effect through the exercise of administrative discretion.<sup>93</sup>

In terms of the impact of treaties in general and the *CRC* in particular on the exercise of administrative discretion, a seminal and highly controversial decision of the High Court of Australia in *Teoh*<sup>94</sup> held that the ratification of a convention gives rise to a 'legitimate expectation' for Australians that the executive will act in accordance with it. In a joint judgment Mason CJ and Deane J held that:

ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as 'a primary consideration'.<sup>95</sup>

The decision in *Teoh* provoked a 'brisk response'<sup>96</sup> from the Australian Government with the issuance of a joint statement by the Minister for Foreign Affairs and the Attorney-General in 1995. Referring to the acknowledgement in *Teoh* that any legitimate expectation that administrative decision-makers would act in accordance with treaty obligations could be displaced by 'statutory or executive indications to the contrary',<sup>97</sup> the Ministers intended to put beyond doubt the fact that entering into a treaty never had and never should give rise to an expectation that government decision-makers would act in accordance with the provisions of the treaty where those provisions had not been enacted into domestic law.<sup>98</sup> According to a number of commentators, the exact legal status of those statements remains unsettled.<sup>99</sup>

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<sup>92</sup> See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J; see also *Dietrich v The Queen* (1992) 177 CLR 292, 306–07, 319–21 (Mason CJ and McHugh JJ); *Teoh* (1995) 128 ALR 353, 362 (Mason CJ and Deane J). See also the cases referred to in Michael Kirby, 'The Australian Use of International Human Rights Norms: from Bangalore to Balliol – a View From the Antipodes' (1993) 16 *University of New South Wales Law Journal* 363 and Michael Kirby, 'Treaties in Australian Law: Role of International Standards in Australian Courts' (lecture delivered at the University of NSW Faculty of Law, 10 May 1995).

<sup>93</sup> Jones, above n 85, 136.

<sup>94</sup> *Teoh* (1995) 183 CLR 273.

<sup>95</sup> *Teoh* (1995) 183 CLR 273, 291 (references omitted).

<sup>96</sup> Ryszard Piotrowicz and Stuart Kaye, *Human Rights in International and Australian Law* (Butterworths, 2000) 202.

<sup>97</sup> See above passage quoted from joint judgment of Mason CJ and Deane J in *Teoh* (1995) 183 CLR 273, 291.

<sup>98</sup> Former Minister for Foreign Affairs, Senator Gareth Evans, and the former Attorney-General, Michael Lavarch, 'International Treaties and the High Court Decision in *Teoh*' (Joint Statement, 10 May 1995).

<sup>99</sup> Piotrowicz and Kaye, above n 96, and Matthew Groves, 'Treaties and Legitimate Expectations – the Rise and Fall of *Teoh*' [2010] 15(4) *Judicial Review* 323 (generally).



In 2011 the Child Rights NGO Report for Australia, *Listen to Children*, ('NGO Report') noted that the *CRC* had still not been comprehensively implemented into Australian law. According to the NGO Report, the lack of comprehensive implementation of *CRC* provisions 'raises concerns in relation to Australia's obligations under Article 4';<sup>100</sup> renders as 'fragmented and inconsistent' the approach to the promotion of children's rights in Australia;<sup>101</sup> and leaves violations of many of the rights in the *CRC* without enforceable remedies.<sup>102</sup> In 2012 the Committee adopted its Concluding Observations on Australia's fourth report to the Committee on the Convention and its Optional Protocols ('Concluding Observations').<sup>103</sup> In its Concluding Observations the Committee expressed concern that

there continues to be no comprehensive child rights Act at the national level giving full and direct effect to the Convention in the State party's national law, and that only two states have passed such legislation. In this context, the Committee further notes that due to the State party's federal system, the absence of such legislation has resulted in fragmentation and inconsistencies in the implementation of child rights across its territory, with children in similar situations being subject to variations in the fulfilment of their rights depending on the state or territory in which they reside.<sup>104</sup>

## 2 *Criticisms of the Convention on the Rights of the Child*

The children's rights movement as a whole is not without critics. Some have questioned the very notion of children as rights bearers.<sup>105</sup> Others have questioned the real value of rights discourses, including the children's rights discourse.<sup>106</sup> The *CRC* itself has frequently been criticised on the basis that, among other things, the standards embodied within it may conflict with culturally-specific norms,<sup>107</sup> or on the basis that those standards reflect

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<sup>100</sup> Child Rights Taskforce, *Listen to Children: 2011 Child Rights NGO Report Australia* (2011) 1 [1.1.1].

<sup>101</sup> *Ibid* [1.1.2].

<sup>102</sup> *Ibid* [1.1.1].

<sup>103</sup> Committee on the Rights of the Child, *Consideration of Reports Submitted by State Parties under Article 44 of the Convention – Concluding Observations: Australia*, 60<sup>th</sup> sess, CRC/C/AUS/CO/4 (28 August, 2012).

<sup>104</sup> *Ibid* 3 [11].

<sup>105</sup> See Eric Engle, 'The *Convention on the Rights of the Child*' (2011) 29 *Quinnipiac Law Review* 793, 812 referring to, although disagreeing with, several arguments made as to the 'inherently problematic' nature of children's rights discourse; see also Charles Francis, 'Australia and the *UN Convention on the Rights of the Child*' (1999, Spring) *National Observer* 41, 44: 'Cohen was well aware that the Convention [on the Rights of the Child] introduced entirely new autonomous personality rights for children based apparently on the doubtful premise that children are autonomous and need new entitlements to develop their personalities.' See also, Gary B Melton, 'Children and Privacy: Are Legal and Psychological Concepts Compatible?' (1983) 62 *Nebraska Law Review* 455, 489 and 493 (referring to, but not endorsing, doubts that children are autonomous).

<sup>106</sup> See, eg, criticisms of the children's rights discourse referred to in Michael Freeman, 'Children's Rights as Human Rights: Reading the *UNCRC*' in Jens Qvortrup, William A Corsaro, Michael-Sebastian Honig (eds) *The Palgrave Handbook of Childhood Studies* (Palgrave Macmillan, 2009) 377, 379–382; see also (generally) Vanessa Pupavac, 'Misantropy Without Borders: The International Children's Rights Regime' (2001) 25(1) *Disasters* 95.

<sup>107</sup> Freeman, above n 106, 382; D'Sa, above n 65, 1279; Jo Boyden, 'Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood' in Allison James and Alan Prout (eds) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood*

largely 'Western' ideals.<sup>108</sup> The wording of some of the *CRC*'s articles has also been criticised as being 'platitudinous' and 'ambiguous'<sup>109</sup> and the effect of the *CRC* has been described in some quarters as 'anti-family'.<sup>110</sup> Reflecting a number of these concerns and others, ratification of the *CRC* by Australia was, both at the time of ratification and subsequent to it, a matter of some controversy.<sup>111</sup>

It is no doubt true to say that the *CRC* has not necessarily 'genuinely or extensively transformed the lived realities of children, especially poor children in the developing world, to the extent that the drafters of the [*CRC*] hoped',<sup>112</sup> nor that it has even transformed the lived realities of Australian children.<sup>113</sup> It is nevertheless suggested here that the *CRC* is properly described as constituting 'a major step forward in the effort to bring the weight of the international community to bear on behalf of a better quality of life for children.'<sup>114</sup> Criticisms of the *CRC* referred to above have been addressed by various scholars.<sup>115</sup> Nevertheless, the *CRC* undoubtedly reflects a conception of childhood

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(Falmer, 2<sup>nd</sup> ed, 2003) 187, 199; see also (generally) Sonia Harris-Short, 'Listening to "The Other"? The *Convention on the Rights of the Child*' (2001) 2 *Melbourne Journal of International Law* 304.

<sup>108</sup> Pupavac, above n 106, 101; see also (generally) Harris-Short, above n 107.

<sup>109</sup> Francis, above n 105, 42.

<sup>110</sup> Jones, above n 85, 126 (that the *CRC* is anti-family is, she argues, a myth); Hazel Hawke, 'A Treaty to Protect Children' (Speech delivered at the launch of the "'A Treaty to Protect Children" Information Campaign', Sydney, 10 July 1989) 4 implicitly acknowledging the 'anti-family' criticisms of the *CRC*: 'It is important to recognise that the Convention does not set up the rights of the child in opposition to the family'; see also Francis, above n 105, 41. Others have criticised the *CRC* for failing to adequately address youth issues and have argued that implementation has not been sufficiently targeted to youth: see, eg, Ellen Desmet, 'Implementing the *Convention on the Rights of the Child* for "Youth": Who and How?' (2012) 20 *International Journal of Children's Rights* 3.

<sup>111</sup> See, eg, Jones, above n 85, 120-30. See also Francis, above n 105; Joint Standing Committee on Treaties, Parliament of Australia, *United Nations Convention on the Rights of the Child* (1998) Chapter 1; see also J Neville Turner, 'Betrayal of Children' (1996) 31(6) *Australian Lawyer* 12, 12 (who refers to some 'fragmented opposition' to ratification of the *CRC*).

<sup>112</sup> Jean Grugel, 'Children's Rights and Children's Welfare after the *Convention on the Rights of the Child*' (2013) 13(1) *Progress in Development Studies* 19, 22 citing Jupp (references omitted).

<sup>113</sup> Turner, above n 111; Child Rights Taskforce, above n 100, iii; and see, eg, ALRC, *Speaking for Ourselves: Children and the Legal Process*, Issues Paper no 18 (1996) [2.8]–[2.20].

<sup>114</sup> A Glenn Mower, *The Convention on the Rights of the Child: International Law Support for Children* (Greenwood, 1997) 5.

<sup>115</sup> Addressing the criticism that the *CRC* reflects Western ideologies see, eg, Detrick above n 78, 21–22, noting that the *CRC* was drafted over a decade by a process of consensus involving an open-ended working group in which all members of the Commission were entitled to participate, although acknowledging that the participation of governments and intergovernmental organisations 'left much to be desired': at 23; on this latter point see also Francis, above n 105, 43: who suggests that governments took little interest in the drafting of the *CRC*, which was mainly done by NGOs. See also Jones, above n 85, arguing that the *CRC* is culturally sensitive. Philip Alston has argued that cultural relativism within the *CRC* can be addressed by application of a principle born out of European Human Rights law, namely the 'margin of appreciation': Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8(1) *International Journal of Law and the Family* 1, 20, a view which has been described by Freeman as a 'valuable way of looking at the debate': Freeman, above n 106, 384. In relation to criticisms that the *CRC* is anti-family see Jones, above n 85, 133, 139–42 (describing this view as a 'myth'), and see Engle, above n 105, 798 (arguing that this criticism is 'overstated'). See also Robin S Mama, 'Needs, Rights and the Human Family: The Practicality of the *Convention on the Rights of the Child*' (2010) 89(5) *Child Welfare* 177, 182 (and quoting Hammerberg, references omitted) and 110, above n , 5.

and of ideals that were dominant at a particular point in history.<sup>116</sup> However, it is also submitted that the *CRC* is very much a living document in the sense that interpretation of the rights expressed within it can and will evolve over time. In other words, the rights in the *CRC*, in so much as they are expressed in fairly general terms, are capable of being interpreted in a way that reflects contemporary norms and values, as well as contemporary (and evolving) understandings about childhood and children and, even, the needs and wishes of children themselves. This is important because the needs, wishes and views of children in relation to the online publication of personal information, including images, in the online environment are likely to evolve just as the impact and role of technology in our lived experience also evolves.

For the purpose of this thesis, the basic premises of the *CRC* — including the premise that the child needs special safeguards and care and is deserving of appropriate protection, including legal protection<sup>117</sup> — are not questioned. Instead, the *CRC* and each of its articles are accepted as being both representational of and influential upon what has been described as an ‘emerging international regime on the rights of the child.’<sup>118</sup>

Following a brief consideration of two of the core principle of the *CRC* — the best interests principle and the right of the child to be heard — the following sections of this chapter examine the rights of privacy, development and freedom of expression.

### 3 *The Best Interests Principle and the Right of the Child to be Heard*

Although the Committee has outlined the four guiding principles of the *CRC*,<sup>119</sup> Freeman has commented that the best interests principle and the right of the child to be heard are the most important.<sup>120</sup> These principles are discussed briefly below.

#### *(a) The Best Interests Principle*

The best interests of the child principle, set out in Article 3(1), provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Alston regards this principle as performing a mediating role whenever there is a conflict between rights,<sup>121</sup> and Parker has suggested that the principle offers guidance where

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<sup>116</sup> See, eg, Pupavac, above n 106, 101.

<sup>117</sup> Preamble to *CRC*.

<sup>118</sup> LeBlanc, above n 70, 282.

<sup>119</sup> Committee on the Rights of the Child, *General Comment No 5*, above n 71, 3–4 [12].

<sup>120</sup> Freeman, above n 106, 385.

<sup>121</sup> Alston, above n 115, 16.

there is a 'lacuna'.<sup>122</sup> According to Freeman, the best interests principle may be used to reinterpret rights or construct new ones.<sup>123</sup>

When interpreting the best interests principle, it is important to note that the obligation is to consider that child's best interests as *a primary consideration*. This needs to be contrasted with the obligation, expressed, for example, in the *Family Law Act 1975* (Cth), to consider the child's best interests as the *paramount* consideration.<sup>124</sup> Tobin has written that the inclusion of the best interests principle recognises that there is the potential for conflict between the rights of a child and those of their parents or their broader community.<sup>125</sup> However, resolution of this conflict does not presuppose a finding that advances the child's interests ahead of others, but rather invokes 'a far more inclusive and nuanced process by which to balance the rights and best interests of children with the rights and interests of other groups within society.'<sup>126</sup> By way of example, and in the context of balancing a child's right to privacy with other interests — such as the right of freedom of expression set out in Article 10 *ECHR*<sup>127</sup> — the Court of Appeal of England and Wales noted in *Weller* that the fact that a child has a reasonable expectation of privacy 'does not automatically mean that any article 10 rights will be trumped by the need to consider the best interests of a child'<sup>128</sup> but does mean that 'where a child's interests would be adversely affected, they must be given considerable weight.'<sup>129</sup>

#### *(b) The Right of the Child to be Heard*

Article 12(1) of the *CRC* provides that:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

This provision is often referred to as 'the right of the child to be heard'. In its General Comment on Article 12, the Committee reported that '[t]he views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws and/or measures as well as their evaluation.'<sup>130</sup> In this regard it is relevant to note that Australian children have been given some opportunity to share their views on the unauthorised online posting of images. In

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<sup>122</sup> Freeman, above n 106, 386 referring to Stephen Parker, 'The Best Interests of the Child – Principles and Problems' (1994) 8 *International Journal of Law and the Family* 26.

<sup>123</sup> *Ibid* 386.

<sup>124</sup> *Family Law Act 1975* (Cth) s 60CA.

<sup>125</sup> John Tobin, 'Judging the Judges: Are they Adopting The Rights Approach in Matters Involving Children?' (2009) 33 *Melbourne University Law Review* 579, 589.

<sup>126</sup> *Ibid*.

<sup>127</sup> *ECHR* art 10.

<sup>128</sup> *Weller* [2015] EWCA Civ 1176 [39] (Lord Dyson MR).

<sup>129</sup> *Weller* [2015] EWCA Civ 1176 [40] (Lord Dyson MR).

<sup>130</sup> Committee on the Rights of the Child, 51<sup>st</sup> session, *General Comment No 12: The Right of the Child to be Heard*, 51<sup>st</sup> sess, UN Doc number CRC/C/GC/12, 5 [12].

the course of its inquiry into Australian privacy law and practice, the ALRC undertook a number of workshops with children and young people whereby the participants were given the opportunity to express their views on a number of issues related to the inquiry.<sup>131</sup> The ALRC also developed a website that sought to engage young people and encourage them to send comments to the ALRC inquiry.<sup>132</sup>

The ALRC reported that young people generally appeared to value the ability to choose what information they disclosed about themselves and to whom, with this control being seen as an aspect of privacy.<sup>133</sup> Many participants in the youth consultation workshops held the view that disclosure of information by themselves to another did not entitle that other to use the information for a different purpose.<sup>134</sup> The ALRC quotes a participant in consultation sessions conducted by the Commission for Children and Young People as saying that: 'privacy matters because it is up to me whether or not I share information and who I share it with.'<sup>135</sup> In relation to the issue of posting of photographs online, the ALRC comments that '[i]n general, young people thought that it was good practice to obtain a person's consent before taking his or her photograph and posting it on the internet.'<sup>136</sup> As already noted above, the ALRC also found that young people believed that individuals should be able to have a photograph removed from a website if the image subject did not consent to its posting.<sup>137</sup>

The views reported above generally support young people's wish for greater control over their image in the online environment than they currently have. Similar views have been aired elsewhere, as already discussed in Chapter One. Young people have not suggested that laws should prevent either the taking of images or the posting of images to the internet, but they have suggested that they should have the ability to effect the take-down of an image where they did not consent to its posting. Although more research needs to be done in this area,<sup>138</sup> it is important that such views are taken into account in developing law and policy around the online publication of images.

#### 4 *The Right to Privacy*

In 2011 the NGO Report emphasised that the lack of comprehensive protection of an individual's right to privacy in Australia was concerning in light of Australia's obligations under Article 16 of the *CRC*.<sup>139</sup> This concern was echoed in the Concluding Observations:

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<sup>131</sup> ALRC, *For Your Information*, above n 3, 2231 [67.29].

<sup>132</sup> *Ibid* [67.27].

<sup>133</sup> *Ibid* 2238 [67.62].

<sup>134</sup> *Ibid* 2232 [67.36].

<sup>135</sup> *Ibid* 2232 [67.36].

<sup>136</sup> *Ibid* [67.41].

<sup>137</sup> ALRC, *For Your Information*, above n 3, 2234 [67.43].

<sup>138</sup> The ALRC noted that there was still 'limited Australian research on the attitudes of young people to privacy': *Ibid* 2224 [67.11].

<sup>139</sup> Child Rights Taskforce, above n 100, 11 [12.1.1].

the Committee is concerned that the State party does not have comprehensive legislation protecting the right to privacy of children. Furthermore, while noting that the Office of the Australian Information Commissioner is empowered to hear complaints about breaches of privacy rights under the *Privacy Act 1998* (Cth), it is concerned that there are no child-specific and child-friendly mechanisms and that those available are limited to complaints made against government agencies and officers and large private organizations. The Committee is also concerned at the inadequacy of privacy protection.<sup>140</sup>

Article 16 of the *CRC* provides that:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour or reputation.
2. The child has the right to the protection of the law against such interference or attacks.

These provisions virtually mirror those of Article 17 of the *International Covenant on Civil and Political Rights*<sup>141</sup> and closely resemble Article 12 of the *Universal Declaration of Human Rights*<sup>142</sup> and Article 8 of *ECHR*.<sup>143</sup> A right to privacy and reputation is also included in the human rights legislation of the Australian Capital Territory<sup>144</sup> and Victoria.<sup>145</sup>

The nature of the protection afforded by Article 16 of the *CRC* is against arbitrary or unlawful interferences with privacy, family or correspondence. While there has been no General Comment released by the Committee on the interpretation of Article 16 specifically, General Comment 16 on the interpretation of the similarly worded Article 17 of the *ICCPR* was released by the Office of the United Nations High Commissioner for Human Rights ('UNHCHR') in 1988 ('General Comment 16 UNHCHR').<sup>146</sup> Given the close resemblance in the wording of Article 17 of the *ICCPR* and Article 16 of the *CRC*<sup>147</sup> it is appropriate to draw on General Comment 16 UNHCHR in the interpretation of Article 16. General Comment 16 UNHCHR notes that interference by states with a person's privacy, family, home or correspondence can 'only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant'.<sup>148</sup> In addition, the

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<sup>140</sup> Committee on the Rights of the Child, above n 103, 10 [41].

<sup>141</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 and 1057 UNTS 407 (entered into force 23 March 1976) ('*ICCPR*') art 17.

<sup>142</sup> *UDHR* art 12.

<sup>143</sup> *ECHR* art 8.

<sup>144</sup> *Human Rights Act 2004* (ACT) s 12.

<sup>145</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

<sup>146</sup> Human Rights Committee, *CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 23<sup>rd</sup> sess, UN Doc HRI/GEN/1/Rev.1 at 21 (1994) (8 April 1988).

<sup>147</sup> The wording of Article 16 *CRC* and Article 17 *ICCPR* are identical but for the fact that Article 16 refers only to 'the child' rather than people in general and that reference to 'home' which appears after the word 'family' in Article 17 *ICCPR* is absent in Article 16.

<sup>148</sup> Human Rights Committee, *CCPR General Comment No 16*, above n 146, [3].

General Comment makes it clear that the word ‘arbitrary’ is intended to encompass even lawful interference and that even interferences which are lawful should be in accordance with the provisions, aims and objectives of the *ICCPR* and should also be reasonable in the particular circumstances.<sup>149</sup> Further the General Comment clarifies that states not only have the obligation to refrain from interferences as specified in Article 17, but that they also have positive obligations to implement a legislative framework that prohibits such interference by others.<sup>150</sup>

The word ‘privacy’ as used in Article 16 is nowhere defined in the *CRC*, nor has any definition been attempted in the other international instruments mentioned above. Although the United Nations Human Rights Committee (‘UNHRC’) has stated that privacy includes a ‘sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone’,<sup>151</sup> it has been observed that the UNHRC itself has ‘not really clarified the notion of privacy’ and that in General Comment 16 UNHCHR it ‘leaves open the definition of the main right enshrined in that article, i.e. the right to “privacy”’.<sup>152</sup>

Given the interrelationship between the various rights of the *CRC*, an interpretation of the right to privacy should take into account the best interests of the child in a given case. Thus, in *Weller*, for example, the Court of Appeal of England and Wales concurred with the findings of the trial judge such that the best interests of the children were a relevant factor in determining that they had an expectation of privacy.<sup>153</sup>

### *The Meaning of ‘Privacy’*

The difficulty of offering any all-encompassing definition of privacy is evident by the prevalence of literature on that very topic. Gormley has described privacy as an ‘evanescent concept’ that many of the foremost legal scholars and philosophers of the twentieth century have attempted to ‘wrestle down’, concluding that in fact a unitary definition of legal privacy (at least) does not and probably never will exist.<sup>154</sup> De Zwart et al have opined that the ‘lack of a common understanding of what is or what should be encompassed within privacy makes it a very fragile creature indeed.’<sup>155</sup> As a concept, privacy has been described by Margulis as one which is ‘experientially obvious [but]

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<sup>149</sup> Ibid [4].

<sup>150</sup> Ibid.

<sup>151</sup> *Coeriel and Aurik v the Netherlands* (9 December 1994) Human Rights Committee, 52<sup>nd</sup> sess, Communication No 453/1991 CCPR/C/52D/453/1991 (‘*Coeriel*’), 10.2.

<sup>152</sup> *Coeriel* (9 December 1994) Human Rights Committee, 52<sup>nd</sup> sess, Communication No 453/1991 CCPR/C/52D/453/1991, individual opinion by Mr Kurt Herndl (dissenting).

<sup>153</sup> *Weller* [2015] EWCA Civ 1176 [38] and [64] (Lord Dyson MR).

<sup>154</sup> Ken Gormley, ‘One Hundred Years of Privacy’ (1992) 1335 *Wisconsin Law Review* 1335, 1336.

<sup>155</sup> Melissa De Zwart, Sal Humphreys and Beatrix Van Dissel, ‘Surveillance, Big Data and Democracy: Lessons for Australia from the US and UK’ 2014 37(2) *UNSW Law Journal* 713, 713.

conceptually frustrating'<sup>156</sup> and Thomson has gone so far as to conclude that 'nobody seems to have any very clear idea what it is.'<sup>157</sup>

What *can* be said of privacy as a concept is that it means different things to different people in different contexts,<sup>158</sup> and may be understood differently depending on one's cultural, geographical and temporal location,<sup>159</sup> as well as upon one's age. In respect of the latter point, Hughes has argued that children may 'require greater and different privacy protection than adults' and that children's privacy raises special issues.<sup>160</sup> Further, privacy may be defined differently depending on whether it is being approached from a philosophical, legal, psychological or other perspective and on whether one is, for example, seeking to explain privacy in terms of how it is experienced,<sup>161</sup> what functions it serves,<sup>162</sup> or what values underlie it.<sup>163</sup>

The difficulty (if not the impossibility) of the task of establishing an all-encompassing definition of privacy has a number of practical consequences. One consequence is that while there remains furious debate over which particular interests laws on privacy should protect, some fundamental questions may remain ultimately unresolved and interests may remain unprotected. As Solove points out, the lack of clarity around the concept of privacy gives rise to difficulties in making policy or resolving a case because of the fact that the privacy harm may not easily be articulated and privacy interests may not be recognised.<sup>164</sup> Nissenbaum has commented that a belief that one must provide an

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<sup>156</sup> Stephen T Margulis, 'Privacy as a Behavioural Phenomenon: Coming of Age (1) in Daniel H Carson (ed) *Man-Environment Interactions: Evaluations and Applications, Part II* (Dowden, Hutchinson & Ross, 1974) Part 6-8 101, 115.

<sup>157</sup> Judith Jarvis Thomson, 'The Right to Privacy' in Ferdinand David Schoeman (ed) *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1984) 272.

<sup>158</sup> Adam Thierer, 'The Pursuit of Privacy in a World Where Information Control is Failing' 36(2) *Harvard Journal of Law and Public Policy* 409, 415 citing a quote from Professor Woodrow Hertzog reported by Cord Jefferson, 'Spies Like Us: We're All Big Brother Now' (see Thierer at 415, FN 20); see also Kirsty Hughes, 'A Behavioural Understanding of Privacy and its Implications for Privacy Law' (2012) 75(5) *The Modern Law Review* 806, 806-7; Solove, above n 43, 1091-2.

<sup>159</sup> ALRC, above n 3, vol 1, 150 [1.66]. See generally James Q Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2003-2004) 113 *The Yale Law Journal* 1152; Patricia Sanchez Abril, 'A (My) Space of One's Own: On Privacy and Online Social Networks' (2007) 6(1) *Northwestern Journal of Technology and Intellectual Property* 73, 73-4. See also Phil Pitchford, 'The Changing Face of Privacy' *UCR The Magazine of UC Riverside*, Fall 2013 < <http://magazine.ucr.edu/85>>.

<sup>160</sup> Kirsty Hughes, 'The Child's Right to Privacy and Article 8 *European Convention on Human Rights*' (2014) 14 *Law and Childhood Studies: Current Legal Issues* 2. A similar point was made by the organisation Le Défenseur des Droits in its submission to the CRC Day of General Discussion on Digital Media and Children's Rights: see Le Défenseur des Droits, *Recommendations of the French Defender of Rights*, Submission to Committee on the Rights of the Child, Day of General Discussion 'Digital Media and Children's Rights', 12 September 2014, 4.

<sup>161</sup> See, eg, Maxine Wolfe and Robert Laufer, 'The Concept of Privacy in Childhood and Adolescence' in Daniel H Carson (ed) *Man-Environment Interactions: Evaluations and Applications, Part II* (Dowden, Hutchinson & Ross, 1974) Part 6-8 (generally). See generally Hughes, above n 158.

<sup>162</sup> See, eg, Alan F Westin, *Privacy and Freedom* (Bodley Head, 1967) 32 - 39. See also Melton, above n 105, (generally).

<sup>163</sup> See, eg, NSWLRC, 20-1 [4.15].

<sup>164</sup> Daniel J Solove, 'A Taxonomy of Privacy' (2006) 154(3) *University of Pennsylvania Law Review* 477, 480.



'account of privacy before one can systematically address critical challenges can thwart further progress.'<sup>165</sup>

While 'privacy' has sometimes been used as a 'battle cry',<sup>166</sup> Solove has observed that there is often no clear account given of the reasons why privacy is important or of the values said to underlie it.<sup>167</sup> It is frequently said that values of human dignity, autonomy or liberty underpin the 'right' of or need for privacy<sup>168</sup> but what is exactly meant by these notions or how they should affect the way in which privacy laws are interpreted and applied is seldom articulated.<sup>169</sup> It has been said that the content of notions of 'autonomy', 'dignity' and 'liberty' is even 'less precisely definable than that of privacy itself',<sup>170</sup> with appeals to these concepts taking place in 'the stratosphere of abstraction'.<sup>171</sup> That is not to say that any attempt to give content to the right of privacy by reference to its underlying values should be forgone: rather that it may be more practical to consider privacy in specific contexts rather than as a generalised concept.<sup>172</sup> Solove has suggested that because 'abstract incantations of "privacy" are not nuanced enough to capture the problems involved',<sup>173</sup> a more pragmatic approach should be taken whereby focus is instead directed to particular problems and concrete practices.<sup>174</sup> In other words, he advocates a 'bottom-up' rather than a 'top-down' approach.<sup>175</sup> A similar approach has been advised by Hughes who describes privacy as a 'multi-faceted concept which derives its meaning in particular situations from the social context and the ways in which people experience and respond to those situations.'<sup>176</sup>

In terms of the context of personal information in computers, Schwartz has suggested that a 'privacy right' is an unsatisfactory basis for regulation of this area and that the law should, instead, 'examine the dangers of specific data processing constellations in which

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<sup>165</sup> Nissenbaum, above n 20, 2.

<sup>166</sup> Solove, above n 43, 1089 [FN 6] (quoting J Thomas McCarthy).

<sup>167</sup> See generally, Solove, above n 43.

<sup>168</sup> See, eg, *Lenah* (2001) 208 CLR 199, 256 [125] (Gummow and Hayne JJ quoting Sedley LJ in *Douglas* [2001] QB 967, 1001: 'the disclosure of private facts and unreasonable intrusion upon seclusion, perhaps come closest to reflecting a concern for privacy "as a legal principle drawn from the fundamental value of personal autonomy"''); see also *Lenah* (2001) 208 CLR 199, 226 [43] (Gleeson CJ): 'the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity.' See also Whitman, above n 159, 1163: 'American privacy law is a body caught in gravitational orbit of liberty values, while European law is caught in the orbit of dignity.'

<sup>169</sup> So, for example, while references are made in *Lenah* (2001) 208 CLR 199 to autonomy (256 [125] (Gummow and Hayne JJ)) and to dignity (226 [43] (Gleeson CJ)) as 'fundamental' to privacy, no definition of or exploration of what is meant by these concepts is given.

<sup>170</sup> NSWLRC, *Invasion of Privacy*, Report 120 (2009) 21 [4.15].

<sup>171</sup> Nissenbaum, above n 20, 10.

<sup>172</sup> *Ibid* 11-12.

<sup>173</sup> Solove, above n 164, 480.

<sup>174</sup> Solove, above n 43, 1092.

<sup>175</sup> *Ibid*.

<sup>176</sup> Hughes, above n 158, 806.

individual information is employed.<sup>177</sup> Some of the dangers for children and young people of the online publication of images were outlined in Chapter Two. Given the nature of those dangers, and the difficulties inherent in defining privacy and giving content to the right to privacy, it is suggested that the other rights enshrined in the *CRC*, and discussed in the following sections of this part, can provide an alternative or additional justificatory basis for a legal response. This is not to say that the problem of the unwanted online posting of images of children and young people, or their subsequent use, is not properly conceptualised as a privacy problem. A number of scholars argue that privacy is in fact best understood as being about control, whether in relation to certain domains (such as personal information)<sup>178</sup> or, more generally, in the sense of controlling access to self in general<sup>179</sup> or the management of social interaction.<sup>180</sup> If privacy is understood in terms of control, therefore, the problem with which this thesis is concerned — that children have insufficient control over the online publication of images of themselves, or subsequent use of those images — is properly conceptualised as a privacy problem. Following that, if a right to privacy is recognised or established in Australian law, and interpreted in line with control-based definitions, the ‘problem’ may be addressed, or partially addressed, by reference to privacy-specific laws (for example, a tort on invasion of privacy). It is of

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<sup>177</sup> Paul Schwartz, ‘The computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination’ (1989) 37 *American Journal of Comparative Law* 675, 676–7.

<sup>178</sup> See, eg, Westin, above n 162, 7; Sidney M Jourard, ‘Some Psychological Aspects of Privacy’ (1966) 31 *Law and Contemporary Problems* 307, 307: ‘The wish for privacy expresses a desire to be an enigma to others or, more generally, a desire to control others’ perceptions and beliefs vis-a-vis the self-concealing person’ (references omitted)]; Edward Shils, ‘Privacy: Its Constitution and Vicissitudes’ (1966) 31 *Law and Contemporary Problems* 281, 283: “‘Private property,’” the “private life,” and “private information” refer to relationships in which the individual or group of individuals retains “possession” of something that might otherwise be shared and that, if shared, is shared on the initiative of the “possessor.” The nature of that “something” is less important than the retention of “possession.” “Possession” means here the control over the movement of these properties across a boundary from person to person or from person to group or from group to group or from group to individual.’

<sup>179</sup> See, eg, Irwin Altman who believes that privacy is ‘an interpersonal boundary control process, designed to pace and regulate interactions with others’: Irwin Altman, ‘Privacy: A Conceptual Analysis’ in Daniel H Carson (ed) *Man-Environment Interactions: Evaluations and Applications, Part II* (Dowden, Hutchinson & Ross, 1974) Part 6-8 3, 3. See also Nicole Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review* 628, 636 who defines privacy as ‘the state of “desired” inaccess’ or ‘freedom from unwanted access.’

<sup>180</sup> See generally Hughes, above n 158; W H Foddy & W R Finighan, ‘The Concept of Privacy from a Symbolic Interaction Perspective’ (1980) 10 (1) *Journal for the Theory of Social Behaviour* 1. It is of particular interest here, in light of the findings in Chapter Two, to refer to the functions ascribed to privacy by Westin, who defined privacy as ‘the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others’: Westin, above n 162, 7. Westin, having made specific reference to theorists, including Goffman, posited that privacy is necessary, amongst other things, to protect the ‘masks’ people wear: ‘Every individual lives behind a mask in this manner; indeed, the first etymological meaning of the word “person” was “mask”, indicating both the conscious and expressive presentation of the self to a social audience. If this mask is torn off and the individual’s real self bared to a world in which everyone still wears his mask and believes in masked performances, the individual can be seared by the hot light of selective, forced exposure. The numerous instances of suicides and nervous breakdowns resulting from such exposures by government investigation, press stories, and even published research constantly remind a free society that only grave social need can ever justify destruction of the privacy which guards the individual’s ultimate autonomy’: Westin, above n 162, 33–4.

interest here to refer to the functions ascribed to privacy by Westin, who defined privacy as ‘the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.’<sup>181</sup> Westin, having made specific reference to theorists, including Goffman, posited that privacy is necessary, amongst other things, to protect the ‘masks’ people wear:

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With this in mind the following chapter considers whether the ALRC’s recommendations for the form of a statutory tort of invasion of privacy might offer a solution or partial solution to the problem with which this thesis is concerned. However, reliance on the contested notion of privacy as the sole footing for a legal response to that problem is likely to be insufficient, as will become clear in the following chapter. As such it is suggested that other rights enshrined within the *CRC*, in particular the right to development, can provide at least part of the justification for new laws relating to the unauthorised posting of online images of children and young people.<sup>183</sup> The right to development is discussed in the following section.

## 5 *The Right to Development*

Article 6(2) of the *CRC* provides that: ‘States Parties shall ensure to the maximum extent possible the survival and development of the child.’ The goal of development is reflected in a number of the other articles of the *CRC*, either expressly or by implication.<sup>184</sup> According to the Implementation Handbook, the concept of survival and development to the maximum extent possible is ‘crucial to the implementation of the whole Convention’,<sup>185</sup> hence the recognition of the right to life and development as one of four general principles of the *CRC*.

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<sup>181</sup> Westin, above n 162, 7.

<sup>182</sup> Ibid 33 - 4.

<sup>183</sup> It is interesting to note here that in *Peck v United Kingdom*, the ECtHR remarked that the right to protection of private life in Article 8 of the *ECHR* included a right to protection of personal identity and development: *Peck v The United Kingdom* [2003] 1 Eur Court HR [57].

<sup>184</sup> Hodgkin and Newell, above n 71, 83.

<sup>185</sup> Ibid.

Woodhead writes that the principle that children have a right to development goes back ‘at least as far as the *Geneva Declaration of the Rights of the Child*’<sup>186</sup> (*‘Geneva Declaration’*). The *Geneva Declaration* was adopted by the League of Nations in 1924 and included a statement that: ‘The child must be given the means needed for its normal development, both materially and spiritually.’<sup>187</sup>

The text of the *CRC* does not elaborate on ‘development’ and how it should be interpreted in giving effect to the right enshrined in Article 6. However, the Committee, in its General Comment No 5, has advised that states should interpret development, both in the context of Article 6 and the *CRC* generally, ‘in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development.’<sup>188</sup> The Committee further advises that implementation measures should be aimed at achieving the optimal development for all children.<sup>189</sup> Nowak, in his detailed commentary on Article 6, writes that the concept of development in Article 6 is thus similar to the concept of ‘human development’ as defined in Article 1 of the United Nations Declaration of the Right to Development in 1986.<sup>190</sup> Novak continues that the Article 6 right to development therefore obliges States Parties to ‘create an environment which enables all children under their respective jurisdiction to grow up in a healthy and protected manner, free

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<sup>186</sup> Woodhead, above n 72.

<sup>187</sup> *Geneva Declaration of the Rights of the Child of 1924*, Adopted 26 September 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924). The meaning of ‘development’ outlined in the Geneva Declaration was reflected in the submissions of the Italian representative on the 1989 Working Group dealing with the drafting of the *CRC*. Arguing against a proposal put forward by the representative of Venezuela in relation to the wording of what was to become Article 6, the Italian representative indicated that: ‘in the language of international organizations the two words “survival” and “development” had come to acquire the special meaning of ensuring the child’s survival in order to realize the full development of his or her personality, both from the material and spiritual points of view’: as quoted in Detrick above n 78, 123. The statement of the right of development set out in the Geneva Declaration was further elaborated in Principle 2 of the *UN Declaration of the Rights of the Child 1959*, which, according to Nowak, was in turn ‘literally repeated’ by Poland in Article II of its initial draft *CRC*, submitted to the UN Commission on Human Rights in 1978: Manfred Nowak, *A Commentary on the United Nations Convention on the Rights of the Child, Article 6: The Right to Life, Survival and Development* (Brill, 2005) 11. That wording is as follows: ‘The child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration’: Wording of Article II of the draft *CRC* as annexed to resolution 20 (XXXIV) of 8 March 1978, see Commission on Human Rights resolution 20 (XXXIV) of 8 March 1978 *Official Records of the Economic and Social Council, 1978, Supplement No 4 (E/1978/34)*, chap. XXVI, sect A; all as reproduced in Detrick at 34. Concerning the draft resolution for the introduction of a *Convention on the rights of the child*, see Chapter XIX of the report of the Commission on Human Rights on its thirty-fourth session, *Official Records of the Economic and Social Council, 1978, Supplement No 4 (E/1978/34)* and for the text of the resolution and draft *Convention on the Rights of the Child* annexed to it: Commission on Human Rights resolution 20 (XXXIV) of 8 March 1978 *Official Records of the Economic and Social Council, 1978, Supplement No 4 (E/1978/34)*, chap. XXVI, sect A – all as reproduced in Detrick at 21–26.

<sup>188</sup> Committee on the Rights of the Child, *General Comment No 5*, above n 71, 4 [12].

<sup>189</sup> *Ibid.*

<sup>190</sup> Nowak, above n 187, 2, referring to the *United Nations Declaration on the Right to Development*, GA Res 41/128, 97<sup>th</sup> plen mtg, UN Doc A/RES/41/128 (4 December 1986).

from fear and want, and to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capacities.’<sup>191</sup>

In common with interpretation of other *CRC* provisions, interpretation of the right to development in Article 6 requires consideration to be given to the other overarching aims and objectives of the *CRC* and, as noted above, the principles of interrelatedness and interdependence. In addition, Article 6 requires states to take *positive measures* to ensure the survival and development of the child: this interpretation being clear, according to Nowak, from the *travaux préparatoires*.<sup>192</sup> The requirement to take positive measures to ensure development is also reflected in the *General Guidelines for Periodic Reports* (‘the Guidelines’)<sup>193</sup> issued in 1996 by the Committee. The Guidelines request states to

describe specific measures taken to guarantee the child’s right to life and to create an environment conducive to ensuring to the maximum extent possible the survival and development of the child, including physical, mental, spiritual, moral psychological and social development, in a manner compatible with human dignity, and to prepare the child for an individual life in a free society.<sup>194</sup>

Nevertheless, the right to development in Article 6 can be described as ‘aspirational’ in the sense that the survival and development of the child is to be ensured ‘to the maximum extent possible’.<sup>195</sup>

#### *(a) What is ‘Optimal Development’?*

As Woodhead has pointed out, interpreting the right to development in practice ‘depends crucially on beliefs and knowledge about how development occurs, what factors harm development and how development can best be fostered.’<sup>196</sup> Yet an interpretation of development and an answer to the question of what constitutes optimal development for a child is necessarily complex and challenging.<sup>197</sup> Indeed, one of the problems in interpreting the Article 6 right to development is that, as discussed in Chapter Two, child development theory does not present a unified perspective on how development occurs and what constitutes optimal development, even across a single domain.<sup>198</sup> Accordingly,

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<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> Committee on the Rights of the Child, *General Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44, Paragraph 1(b) of the Convention*, Adopted by the Committee at its 343<sup>rd</sup> meeting (thirteenth session) on 11 October 1996.

<sup>194</sup> Ibid [40].

<sup>195</sup> Priscilla Alderson, *Young Children’s Rights: Exploring Beliefs, Principles, Practice* (Jessica Kingsley, 2<sup>nd</sup> ed, 2008) 18. However, it has also been said that where resources are demonstrably available, then the aspirational rights may be more immediate: Dominic McGoldrick, ‘The United Nations *Convention on the Rights of the Child*’ (1991) 5 *International Journal of Law and the Family* 132, 138.

<sup>196</sup> Woodhead, above n 72, 83.

<sup>197</sup> Ibid (generally).

<sup>198</sup> For example, Piaget’s cognitive-developmental perspective, although of significant influence, has nevertheless been criticised and challenged by many, and modified by others: see Laura E Berk, *Infants, Children, and Adolescents* (Allyn and Bacon, 4<sup>th</sup> ed, 2002) 22. See also Woodhead, above n 72, 83–5.

it may not be possible to give a definitive answer to what optimal development is nor how optimal development can best be fostered. Nevertheless, an understanding of child development and the factors that influence development, both positively and negatively, can be approached by considering, among other things, scientific research on childhood and child development (including research in the field of developmental or child psychology and childhood studies).<sup>199</sup>

By drawing on some of the research in the field of developmental and social psychology, Chapter Two has indicated that the online existence of images of children presents a number of threats to development. These threats need to be addressed, in line with the child's right to development. Nevertheless, it also needs to be recognised that the internet also presents 'unique opportunities' for child development<sup>200</sup> and these positive aspects must also be considered within the context of any framework that seeks to respond to the threats.<sup>201</sup>

#### *(b) Right of Development and Other Rights under the CRC*

As discussed above, the rights of the *CRC* are fundamentally interconnected and the right of development is one of the four principles that should guide the interpretation of the other rights.<sup>202</sup> In its General Comment No 4 on 'Adolescent Health and Development in the Context of the Convention on the Rights of the Child', the Committee noted that the civil rights and freedoms of children and adolescents, as set out in Articles 13-17 of the *CRC*, are 'fundamental to guaranteeing the right to health and development of adolescents.'<sup>203</sup> Of these, the right to privacy (Article 16) has already been discussed in Section Four above, the right of the child to be heard (Article 12) was discussed in Section Three, and the right to freedom of expression (Article 13) is discussed below.

### *6 The Right to Freedom of Expression*

Article 13 of the *CRC* provides that:

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

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<sup>199</sup> Woodhead, above n 72, 85.

<sup>200</sup> Australian Psychological Association, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 11 March 2014, 3.

<sup>201</sup> See, eg, Australian Psychological Association, above n 200, 4; Australian Youth Affairs Coalition, Submission to Senate Committee, *The Adequacy of Protections for the Privacy of Australians Online*, January 2011, 5–7.

<sup>202</sup> Committee on the Rights of the Child, *General Comment No 5*, above n 71, 3 and 4 [12].

<sup>203</sup> Committee on the Rights of the Child, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 33<sup>rd</sup> session, UN Doc CRC/GC/2003/4 (1 July 2003) 3 [10].

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others; or
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The protection enshrined in Article 13 closely resembles Article 19 of the *ICCPR*.<sup>204</sup> The right to freedom of expression is also incorporated into the *UDHR*<sup>205</sup> and *ECHR*,<sup>206</sup> as well as in human rights legislation enacted in the Australian Capital Territory and Victoria.<sup>207</sup> In Australia, an aspect of the right to freedom of expression, namely the right to freedom of political communication, is implied under the Constitution.<sup>208</sup>

A detailed consideration of the scope and nature of the right to freedom of expression, and its underlying rationales, is beyond the scope of this chapter.<sup>209</sup> However, it is important to at least briefly consider the right to freedom of expression here for a number of reasons.

Firstly, the right to freedom of expression has been described as being ‘as much a fundamental right on its own accord as it is an “enabler” of other rights.’<sup>210</sup> In the context of children’s rights, the right to freedom of expression has a key role in enabling the realisation of one of the *CRC*’s general principles, namely the child’s right to express their views freely in all matters affecting the child, and for those views to be given due weight.<sup>211</sup>

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<sup>204</sup> Article 19 also includes, however, the right to hold opinions without interference. The UN Special Rapporteur has observed, however, that that right is either implied into Article 13, or else covered by Article 12 or 14 of the *CRC*: Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/69/335 (21 August 2014) (focusing on the right of the child to freedom of expression) 6. Article 13 also does not include the first sentence of paragraph 3 of Article 19 of the *ICCPR*: ‘The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities.’ According to the Special Rapporteur, ‘The inclusion of this sentence, which was introduced in the Covenant because of the powerful influence of modern media of expression, was apparently not found necessary with regard to the child’s freedom of expression’: La Rue, at 6.

<sup>205</sup> *UDHR* art 19.

<sup>206</sup> *ECHR* art 10.

<sup>207</sup> *Human Rights Act 2004* (ACT), s 16 and *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15.

<sup>208</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106; *Unions NSW v New South Wales* [2013] HCA 58. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (requirement for freedom of communication is a consequence of the Constitution’s system of representative and responsible government and it is this requirement, rather than the right of communication, that is found in the Constitution: at [566]).

<sup>209</sup> For a detailed consideration of aspects of freedom of expression see links on the website of the UN Special Rapporteur: United Nations, ‘Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ <<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>> and see especially, La Rue, above n 204.

<sup>210</sup> La Rue, above n 63, [22].

<sup>211</sup> *CRC* art 12. The Special Rapporteur has observed that the right to freedom of expression and the right to be heard are often confused, whereas they represent distinct rights. However, he refers to the fact that Article 12 imposes an obligation on State Parties to ‘adopt appropriate measures to facilitate the active

Secondly, as noted by the former United Nations Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression ('Special Rapporteur') — and following on from the first point made above — the internet has 'become a key means by which individuals can exercise their right to freedom of expression and opinion.'<sup>212</sup> By 'acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realization of a range of other human rights.'<sup>213</sup> Children's access to and use of the internet clearly plays a key role in their development. In this regard, the Special Rapporteur has noted that the internet is an 'important vehicle for children to exercise their right to freedom of expression and can serve as a tool to help children claim their other rights'.<sup>214</sup> In addition, the Special Rapporteur commented on the benefits of social networking sites as a means of encouraging supportive relationships and creativity, as a platform for self-expression and as an enabler of choices and opinions informed by peer preferences (among other things).<sup>215</sup> The Special Rapporteur has also emphasised that restrictions on internet use should be looked at 'carefully and critically in order to uncover potentially negative consequences for children and adults, encourage practical solutions to Internet safety concerns and maximise opportunities for children on the Internet.'<sup>216</sup> Thus, while limits upon freedom of expression are permitted where they are in accordance with Article 13(2) above, any constraints upon online expression, including constraints on the posting of images, must be considered by reference not only to their impact on the right to freedom of expression but by reference to their impact on the realisation of other rights that depend upon that right (including the right to development).

Thirdly, and related to both previous points, the Committee has flagged the *CRC*'s civil rights and freedoms, including Article 13 (right to freedom of expression), as 'fundamental in guaranteeing the right to health and development of adolescents.'<sup>217</sup> Nevertheless, this right can sometimes conflict with other rights and freedoms. Where there is a conflict between freedom of expression and other rights, the right to freedom of expression may need to be limited and any such limitations must—in accordance with Article 13(2) — be provided for by law and be necessary to 'respect the rights and reputations of others' or for the 'protection of national security or of public order or public health or morals.' In its submission to the Department of Communications as part of the Australian Government's public consultation into *Enhancing Online Safety for Children*, the Australian Human Rights

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involvement of children in all decisions and processes affecting them' and notes that the Committee on the Rights of the Child considers that 'the creation of an enabling environment for children to express their views freely also contributes to building children's capacities to exercise their right to freedom of expression': La Rue, above n 204, 8.

<sup>212</sup> La Rue, above n 63, [20].

<sup>213</sup> Ibid [22].

<sup>214</sup> La Rue, above n 204.

<sup>215</sup> Ibid 17.

<sup>216</sup> Ibid 19.

<sup>217</sup> Committee on the Rights of the Child, *General Comment No 4*, above n 202, 3 [10].



Commission expresses the view that '[l]imits on free speech can be justified in certain circumstances, particularly in the context of the protection of children's safety.'<sup>218</sup> However, any restrictions on freedom of expression must also be reasonable and proportionate<sup>219</sup> in order to achieve the proper balance between that right and others.

A 'familiar theme' is that the right to freedom of expression is often seen as existing in opposition to and conflict with the right to privacy.<sup>220</sup> While some conflicts are inevitable, this should not obscure an important fact: namely that the right to privacy and freedom of expression are also often complementary rather than competing. As the ALRC have recently noted, privacy 'underpins freedom of speech, thought and self-expression.'<sup>221</sup> Barendt has written that 'some privacy protection is necessary for [individuals] to exercise their speech rights free from anxiety and inhibition.'<sup>222</sup> Moreover, one of the commonly cited rationales for freedom of expression is the self-determination rationale whereby 'free speech is conceived of as an aspect of self-realisation and individual autonomy.'<sup>223</sup> This rationale sees freedom of expression as having an 'inherent value'.<sup>224</sup> According to the self-determination rationale, '[t]he ability to relate our thoughts and experiences is asserted to be an intrinsic part of being human. Restrictions on freedom of expression therefore potentially inhibit self-fulfilment and individual autonomy.'<sup>225</sup>

The capture and communication of images of oneself and others is undoubtedly a form of expression. Writing about the practice of people taking intimate images of themselves and sharing them with others, Bambauer describes the images involved as an 'important exemplar of non-commercial amateur production of expressive content'.<sup>226</sup> However, in Bambauer's view, this form of expression is potentially undermined by the threat of non-consensual display of those images.<sup>227</sup> That is, the fear of non-consensual display of images of ourselves might have a chilling effect on the creation of images of ourselves ('selfies'). But what of the relationship between freedom of expression and images created by others? Bambauer suggests that the production process as a whole is dependent, albeit 'counterintuitively' on 'recognizing the interests of people captured in

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<sup>218</sup> Australian Human Rights Commission, above n 64, 5.

<sup>219</sup> Human Rights Committee, *General Comment No 34 - Article 19: Freedoms of Opinion and Expression*, 102<sup>nd</sup> sess, Un Doc CCPR/C/GC/34 (12 September 2011). See also La Rue, above n 204, 20.

<sup>220</sup> Eric Barendt, 'Privacy and Freedom of Speech' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law* (2010 Cambridge) 11. See also Josh Blackman, 'Omniveillance, Google, Privacy in Public, and the Right to your Digital Identity; A Tort for Recording and Disseminating an Individual's Image over the Internet' (2009) 49 *Santa Clara Law Review* 313, 326.

<sup>221</sup> ALRC, *Serious Invasions of Privacy in the Digital Era*, Report no 123 (2014) 30 [2.6].

<sup>222</sup> Barendt, above n 220, 31.

<sup>223</sup> Australian Human Rights Commission, above n 64, 6 citing David Rolph, Matt Vittins and Judith Bannister, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2010) 23–26.

<sup>224</sup> David Rolph, Matt Vittins and Judith Bannister, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2010) 28

<sup>225</sup> Ibid.

<sup>226</sup> Derek E Bambauer, 'Exposed' (2013–2014) 98 *Minnesota Law Review* 2025, 2031.

<sup>227</sup> Ibid.

these videos of photos’ and suggests that legal recognition of those interests is a ‘generative move’.<sup>228</sup> However, it is important to understand that ‘expression’ is not limited to the relaying of thoughts and experiences (nor the capture and sharing of images). Expression can take many forms, including action, interaction, behaviour, dress and so on.<sup>229</sup> Scanlon defines expression as follows:

any act that is intended by its agent to communicate to one or more persons some proposition or attitude. This is an extremely broad class. In addition to many acts of speech and publication it includes displays of symbols, failures to display them, demonstrations, many musical performances, and some bombings, assassinations and self-immolations. In order for any act to be classified as an act of expression it is sufficient that it be linked with some proposition or attitude which it is intended to convey.<sup>230</sup>

As such, it is here suggested that expression should be considered not only as the things people say (including to one another) but the way in which people act and behave, whether in public or private. According to this broad understanding of expression, self-presentation is a form of expression. Chapter Two discussed how people present themselves differently in different contexts, and that the unauthorised publication of images online can collapse contexts and threaten self-presentation claims. As such, the failure to address the problem of unwanted online publication of images or their subsequent use can affect an individual’s self-presentation, and therefore their expression. The unwanted posting or use of images might also threaten expression in other ways — people might act differently not for fear of having their self-presentation claims challenged but for fear that a broader audience will have ‘access’ to those images and what they reveal about a person. This notion is captured in the SCAG Discussion Paper ‘Unauthorised Photographs on the Internet and Ancillary Privacy Issues’ and it is worth repeating the extract from this paper, which was set out earlier in Chapter Two:

People present themselves differently in different public places. For instance, while a person might be comfortable wearing and being seen in a swimsuit at the beach, they might not be comfortable being seen in a swimsuit whilst shopping in a mall. While a person might be comfortable in presenting themselves in a particular way at a beach, a photograph, which facilitates a permanent image, provides a broader context for those images.<sup>231</sup>

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<sup>228</sup> Ibid 2032.

<sup>229</sup> Human Rights Committee, *General Comment No 34*, above n 219, [11] noting that freedom of expression ‘includes political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising’ (references omitted). See also [12] noting that ‘[ICCPR] protects all forms of expression and the means of their dissemination ... Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions’ (references omitted).

<sup>230</sup> Thomas Scanlon, ‘A Theory of Freedom of Expression’ (1972) 1(2) *Philosophy & Public Affairs* 204, 206.

<sup>231</sup> Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper, August 2005, 9 [33].

The NSW Commissioner for Children has observed that the ‘unauthorised publication of photographs can cause distress to children, young people and families involved. It can make them fearful of further occurrences and affect their enjoyment of being in public places.’<sup>232</sup>

A failure to address the problem of the unwanted online publication of images or their subsequent use may, therefore, have a chilling effect on expression. An example of this is given by Nissenbaum and relates to Google Street View. Google Street View is a feature of Google Maps that offers ‘360-degree photographic “streetscapes” that allow users to “explore neighbourhoods at a street level — virtually”.’<sup>233</sup> Nissenbaum notes that in order to comply with national privacy laws in Australia and Canada, Google Street View blurred the faces of individuals and vehicle licence plates in those countries, but took no such measures in its coverage of US cities.<sup>234</sup> Nissenbaum notes that in relation to images of themselves appearing on Google Street view, individuals are ‘concerned about embarrassment, loss of control over information about their activities and whereabouts, and possible harmful consequences such as ridicule or sanction.’<sup>235</sup> In reaching the conclusion that the failure to blur faces results in an inappropriate flow of information, Nissenbaum considers not only the possible harmful consequences (described above) but also the purposes and values of the context in which the information was gathered: namely people appearing in public or open spaces. Here, Nissenbaum asserts that those purposes and values are contravened by ‘even the remotest chance of a chilling effect on behaviour otherwise permitted on public thoroughfares’<sup>236</sup> (by virtue, presumably, of a concern that one’s image may appear online and be publically accessible).<sup>237</sup> In fact, legal action was brought against Google Street View in 2014 by a Canadian woman who was depicted sitting outside her house with ‘part of her breast exposed’.<sup>238</sup> Google was ordered to pay compensation to the claimant who claimed to have suffered: ‘Mockeries, derisions, disrespectful and [sic] sexually related comments in relation to the photographs’.<sup>239</sup> It is quite possible that such an experience would have a chilling effect on the image subject’s future behaviour.

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<sup>232</sup> NSW Commission for Children and Young People, Submission to the Standing Committee of Attorneys-General (SCAG), *Discussion Paper: Unauthorised Photographs on the Internet and Related Privacy Issues*, October 2005, 3.

<sup>233</sup> Nissenbaum, above n 20, 51.

<sup>234</sup> Ibid 217.

<sup>235</sup> Ibid 219.

<sup>236</sup> Ibid 221.

<sup>237</sup> A recent example of the intrusive capacity of Google Street View is provided in the case, reported in 2014, of a Canadian woman who successfully sued Google for compensation after she was shown sitting outside of her house with ‘part of her breast exposed’: see Jeff John Roberts, *Google Must Pay Canadian Woman \$2,250 for Showing her Cleavage in Street View*, Gigaom Research (29 October 2014) <<https://gigaom.com/2014/10/29/google-must-pay-canadian-woman-2250-for-showing-her-cleavage-in-street-view/>>.

<sup>238</sup> Ibid, referring to the case of *Maria Pia Grillo c. Google Inc* 2014 QCCQ 9394 (Cour Du Québec) (‘Grillo’).

<sup>239</sup> *Grillo* 2014 QCCQ 9394 (Cour Du Québec) [24].

In *Murray* the Court of Appeal of England and Wales were required to determine whether the plaintiff, a minor and the young son of celebrity author J K Rowling, was entitled to a reasonable expectation of privacy such that photographs surreptitiously taken of him and his family on the way to a local cafe and then published in the press would constitute an invasion of that privacy.<sup>240</sup> The Court referred to the trial judge's arguments that a distinction could be drawn between a person engaged in family and sporting activities, on the one hand, and on the other 'something as simple as a walk down the street or a visit to the grocers to buy milk.'<sup>241</sup> The trial judge had argued that a reasonable expectation of privacy might attach to the former type of activity, following *Von Hannover v Germany*,<sup>242</sup> but that if it attached to the latter it would be tantamount to creating an expectation of people not being photographed without consent. The Court of Appeal, however, did not agree that it was 'possible to draw a clear distinction in principle between the two kinds of activity.' The Court of Appeal went on to say:

Thus, an expedition to a café of the kind which occurred here seems to us to be at least arguably part of each member of the family's recreation time intended to be enjoyed by them and such that publicity of it is intrusive and such as adversely to affect such activities in the future.<sup>243</sup>

There is recognition in this section of the Court of Appeal's judgment that intrusion into this private sphere might adversely influence an individual's future decisions about engaging in activities in the public eye.

To take another example from Case Study Two (Tim), the fact that Tim has no control over publication of his image on the internet (and has no legal grounds for seeking its removal) may well mean that the next time Tim plays football in the park he will think twice about removing his shirt. Moreover, he may be more cautious generally about visiting the local swimming pool or changing in the school changing rooms after a sports lesson. If so, Tim's freedom of expression will have been curtailed and his expression 'chilled'.

Further, if freedom of expression is also understood as the freedom to choose whether and how one presents oneself to the outside world, then removing that choice by publishing an image of another online can impact on the image subject's freedom of expression – at least where the publication is unwanted. However, although the unwanted online publication and use of an image may have a chilling affect on expression vis-a-vis a particular image subject, this is not inevitable. As noted in Chapter Two, the reaction to the unwanted publication or use of one's image, or even the threat thereof, is subjective. However, it is suggested that the fact that children and young people have

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<sup>240</sup> *Murray* [2008] EWCA Civ 446 [38].

<sup>241</sup> *Murray* [2008] EWCA Civ 446, [44] citing *Murray v Express Newspapers* [2007] EWHC 1980 (Ch) [66] (Patten J).

<sup>242</sup> *Von Hannover v Germany* [2004] IV Eur Court HR 41.

<sup>243</sup> *Murray* [2008] EWCA Civ 446, [55] (emphasis added).

little control over the online publication of an image or its subsequent use and, in particular, the fact that they often have no legal grounds upon which to call for the removal from online publication of such images is more likely to have an overall chilling effect on expression in the future.

Any legal measures that seek to address this lack of control will *prima facie* almost invariably interfere with another's freedom of expression. Most directly, such measures will interfere with the expression of the individual who posted the image (who will often be the person who also captured the image). Less directly, those measures will interfere with the 'freedom of others to seek, receive and impart information and ideas of all kinds', and this implicates individuals as well as organisations (for example, social media providers and other internet content hosts).

Given the above, any restrictions on freedom of expression that are mandated through law need to be considered by reference to the terms of Article 13(2): namely, whether they are necessary to respect the rights or reputations of others. In considering whether such restrictions are necessary to respect the rights or reputations of others, the right to freedom of expression of an image subject should be considered along with other rights such as the right to privacy and, where the image subject is a child, the right to development. Moreover, any such restrictions need to be proportionate to achieve the correct balance between rights.<sup>244</sup> In considering whether restrictions meet these criteria, freedom of expression should not be placed only on one side of the scales — the side of the person posting the image online, or sharing it with others. For the reasons described above, in so far as self-presentation and choice over whether and how to present oneself to the outside world constitute expression, an image subject's claim to freedom of expression should also be weighed into the equation.

#### IV CHAPTER SUMMARY AND CONCLUSIONS

The discussion part of this chapter began, in Section A, by explaining Lessig's four modalities of regulation in cyberspace, namely law, social norms, the market and architecture, or 'code'. With reference back to Chapters Three and Four this part of the chapter noted that there are limitations in the extent to which Australian law provides children with control over the online publication of their image, or its subsequent use. This is a problem because the limitations on control can have implications for a child's development. The chapter then considered why Lessig's other modalities of regulation do not adequately address the problem of the unwanted online publication of images of children or their subsequent use, and in some cases might even encourage such publication or use, thereby potentially exacerbating the risk of harm. Section A concluded

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<sup>244</sup> Human Rights Committee, *General Comment No 34*, above n 219.

that, in order to address the problem of unwanted online publication of images of children or their subsequent use, a legal response was necessary.

The chapter then moved to consider a justificatory basis for any such legal response. Section B of Part Three began by providing background on the *CRC* before briefly considering two of its core principles: the best interests principle and the right of the child to be heard. With regard to the latter it was noted that more research is needed as to children's views regarding the issue of the unwanted online posting of images of other children or the use of online images of others, and as to what an appropriate response to that issue may be. Some of the views that have been expressed by children in this regard were presented. It was noted that those views were generally supportive of giving children the ability to remove images that were posted online without their consent.

Subsequent sections examined the right to privacy, the right to development and the right to freedom of expression. The difficulty in giving content to the right to privacy was noted, largely due to definitional challenges around the concept of privacy. This part of the chapter concluded that a right to privacy could provide a justificatory basis for laws that sought to give children more control over the online publication of image. However, it was suggested that in recognition of the difficulties of giving content to a right of privacy, the right of development set out in the *CRC* could provide an alternative footing upon which to ground new laws designed to address the problem with which this thesis is concerned. The right to development, its interpretation and scope was then explored before moving on to consider the right to freedom of expression. This part of the chapter emphasised the importance of viewing the right to freedom of expression (also contained in the *CRC*) as complementary of other rights, in particular the right to privacy. Here the breadth of the term 'expression' was noted, a term which — it was suggested — could include expression through self-presentation. While any laws that aim to give children more control over their image in the online environment often entail restrictions on the exercise of expression of others, this part of the chapter argued that the failure to provide such control also impacted on the freedom of expression of image subjects themselves.

In conclusion, this chapter has argued that a legal response to the problem with which this thesis is concerned is required and that the *CRC*, and in particular the right to development, provides a justificatory basis for that response. As US Senator Ted Markey has remarked '[t]he right to develop is very important right for children and in an online world that is something that we must protect as being sacred.'<sup>245</sup> The question, then, is not whether Australia needs to respond to the threats to development posed by the online existence of images, but rather what form that response should take. The following chapter takes this up by discussing and critically evaluating a number of law reform

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<sup>245</sup> Congressman Edward J Markey, Speech to EU Conference: Privacy and Protection of Personal Data (United States Institute of Peace, Washington DC, 19 March 2012).

options. One particular option from those discussed is put forward as the best option to address the central problem with which this thesis is concerned.

## CHAPTER SIX – OUTLINE AND EVALUATION OF LAW REFORM OPTIONS

### I INTRODUCTION

The previous chapter concluded that neither extant laws and social norms, nor the market and the architecture of the internet (or ‘code’) are sufficient to address the problem of the unwanted online posting of an image of a child or its subsequent use. The chapter concluded that a legal response was therefore required. This chapter overviews a number of law reform options and evaluates one option in more detail. This chapter therefore addresses research objective (7) of this thesis: to identify and critically evaluate a number of law reform options.

### II CHAPTER OUTLINE AND SCOPE

The Australian Government Guide to Regulation states that at least one policy option explored as a response to a problem should be non-regulatory.<sup>1</sup> Given that the previous chapter illustrated the need for a regulatory response, this chapter confines itself to considering only regulatory options. However, the recommendations section of Chapter Seven considers non-regulatory options that should operate in addition to any regulatory option that is introduced.

A number of law reform options could provide a partial solution to the problem with which this thesis is concerned. However, although this thesis has argued that there is certainly a risk of harm to individual children from the unwanted publication of images, the actual occurrence of harm is not a given. Whether harm actually eventuates depends on a range of factors — some internal (such as the level of a child’s resilience and self-esteem and their own response to an image of themselves) and some external (the way in which others respond to a particular image; the support network available to the image subject). At this stage, therefore, legislating to remove the risk — rather than deal with the harm as and when it does occur — must be considered overreach. This is one reason that law reforms that would make it unlawful or actionable as a civil wrong to capture and/or publish images of children per se are not considered further in this chapter. This includes reforms that would make it unlawful or actionable to capture and/or publish images of children without prior consent. That said, one of the recommendations of this thesis is that further research is needed as to the impact of unwanted publication of images on children’s development. In light of findings from that research, it may be that more does need to be done to manage the risk at its source.

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<sup>1</sup> Commonwealth of Australia, Department of the Prime Minister and Cabinet, *The Australian Government Guide to Regulation* (2014) 26.



When proposing the adoption of new regulation, or the abolition of existing regulation, the Australian Government's RIS requires policymakers to measure the 'net benefit' of each policy option — this requires all of the costs and benefits of each option to be taken into account.<sup>2</sup> According to the RIS, the benefits will usually accrue via the achievement of the desired policy objective, while costs include economic, social and environmental costs.<sup>3</sup> Rather than outlining the relative benefits and costs of each law reform option presented, however, this chapter will consider only the key benefit of each option—namely the extent to which it is likely to be effective in solving the problem with which this thesis is concerned. Having described the way in which the key benefit of each option will be evaluated and after assessing the key benefit of each option, Part Three of this chapter then concludes that only one of those options is likely to be at all effective. Part Four of this chapter then analyses that option in more detail — taking into account other benefits as well as costs. Part Five, offers some general conclusions.

### *Evaluating the Key Benefit of Each Law Reform Option*

As noted above, the key benefit of any law reform option is the extent to which it is likely to be effective in addressing the problem it is being implemented to address.

As this thesis is concerned with children and young people, any effective legal response must address practical issues associated with the capacity of children and young people to utilise legal mechanisms, not least in terms of cost and other 'access to justice' issues. Processes and procedures that are built around legal measures, as well as the attitude of courts to claims brought by or on behalf of children, are all important in determining how easily children are able to utilise a particular legal remedy. Perhaps even more fundamental, however, is the nature of the remedy itself. Remedies that depend upon an individual accessing 'the machinery of formal justice' (lawyers, courts or dispute resolution services)<sup>4</sup> generally involve more complexity than non-formal resolution mechanisms. Accessing courts or tribunals often requires the assistance of a legal representative and, for children, a litigation representative.<sup>5</sup> Moreover, accessing formal justice machinery is likely to be expensive.<sup>6</sup> Given that legal aid is generally unavailable to individuals who wish to pursue civil actions, the cost of pursuing a civil remedy is likely to be prohibitive for many children, particularly if they are not supported by their parents in

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<sup>2</sup> Ibid 32.

<sup>3</sup> Ibid 31.

<sup>4</sup> Attorney-General's Department Access to Justice Taskforce, Australian Government, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report (September 2009) 2.

<sup>5</sup> Known as a 'next friend' or 'guardian ad litem': ALRC, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [13.6]–[13.8].

<sup>6</sup> Australian Government, *Strategic Framework for Access to Justice*, above n 4, 4.

bringing the action.<sup>7</sup> As such, the most effective remedies are likely to be ones that, by their nature, are readily accessible by children and young people.

On the other hand, as discussed in Chapter Five, law and social norms are interrelated. As such, while formal legal remedies might be difficult for children to access, their existence could nevertheless have an indirect impact by influencing behaviour and social norms, the market or the architecture of the internet.

As was noted in Chapter Two, a legislative response to the risk of harm arising from the unwanted publication of images of children or their subsequent use needs to consider the overall impact on children's development, as well as upon the rights, interests and freedoms of others. That is, a response that is assessed only by reference to its efficacy in reducing the risk of harm might in itself compromise some of the positive developmental processes associated with children's use of the internet and social media in general, or the capture and sharing of images of other children. For example, a response to the risk of harm in the form of a ban on the capture or publication of images of children would necessarily impinge on the positive developmental implications associated with such practices — these include the development of expression, social networks and self-identity. This is another reason why a reform option along these lines is not considered in this chapter. A response that sought to limit children's access to the internet, or impose restrictions on children's use of social media (for example) could also compromise positive developmental processes, such as identity formation, community building and creativity<sup>8</sup> and the development of 'digital age literacies'.<sup>9</sup> For this reason, a response along these lines is also not considered further.

### III OVERVIEW OF LAW REFORM OPTIONS

The following sections provide an overview of the various reform options before moving on, in Part Four, to evaluate more closely one particular option: the introduction of a take-down scheme in relation to images of children.

#### A *A Statutory Cause of Action for Serious Invasions of Privacy*

One possible law reform option is the introduction of a statutory cause of action for invasion of privacy. Such an action was proposed by the ALRC in 2008, and the form of the

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<sup>7</sup> Community Law Australia, *Unaffordable and Out of Reach: The Problem of Access to the Australian Legal System*, Report (July 2012) 7; Commonwealth of Australia, Productivity Commission, *Access to Justice Arrangements*, Inquiry Report no 72 (2014) vol 1 30.

<sup>8</sup> See, eg, Teresa Swist et al, 'Social Media and the Wellbeing of Children and Young People: A Literature Review' (Report prepared for Commissioner for Children and Young People, Western Australia, 2015) 5; Australian Human Rights Commission, *Children's Rights Report 2014 – National Children's Commissioner*, (2014) 17. See also Australian Human Rights Commission, *Children's Rights Report 2015 – National Children's Commissioner* (2015) 78.

<sup>9</sup> Aspen Institute Task Force on Learning and the Internet, *Learner at the Center of a Networked World* (2014) 72.

action was reconsidered in 2014.<sup>10</sup> If a statutory cause of action for invasion of privacy is introduced in the form proposed by the ALRC, it would be available to all individuals able to establish the elements of an action, and would not be limited to children. The ALRC recommended that the statutory cause of action for serious invasion of privacy be introduced in Commonwealth legislation<sup>11</sup> and that it be described as an action in tort.<sup>12</sup> The elements of the action as proposed by the ALRC are that the plaintiff's privacy has been invaded by an intrusion upon their seclusion or the misuse of private information; that a person in the position of the plaintiff would have had a reasonable expectation of privacy in all the circumstances; that the invasion was intentional or reckless; and that the invasion was serious. The ALRC has recommended that the tort be actionable per se but that a court must be satisfied that the public interest in privacy outweighs any countervailing public interests.<sup>13</sup>

The ALRC has recommended that a range of remedies should be available to courts in the event that a plaintiff is successful in bringing an action for invasion of privacy. These remedies include an award of damages, including for emotional distress,<sup>14</sup> and an order for the delivery up, destruction or removal of material.<sup>15</sup> An order for removal of material may require its removal from the internet by the defendant, but may also involve a take-down order addressed to an online provider, or to an individual who controls their own website.<sup>16</sup> The ALRC has also recommended that courts be given the ability to issue

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<sup>10</sup> ALRC, *For Your Information: Australian Privacy Law and Practice*, Report no 108 (2008) vol 3, 2584 [Recommendation 74-1]; ALRC, *Serious Invasions of Privacy in the Digital Era*, Report no 123 (2014). A similar recommendation has also been made by the NSWLRC: NSWLRC, *Invasion of Privacy*, Report No 120 (2009) 4 [1.5]; and see 3–4 [1.1]–[1.4] and more recently the introduction of a statutory cause of action for serious invasions of privacy has also been recommended for introduction into the law of NSW by that jurisdiction's Standing Committee on Law and Justice: NSW, Standing Committee on Law and Justice, *Remedies for the Serious Invasion of Privacy in New South Wales*, Report, 3 March 2016, 57 [Recommendation 3]. A cause of action for serious invasion of privacy has also been recommended for introduction into South Australian law: South Australian Law Reform Institute, *A Statutory Tort for Invasion of Privacy*, Report no 4, March 2016, 26 [Recommendation 1]. In 2010 the Victorian Law Reform Commission also recommended the introduction of a statutory cause of action for invasions of privacy related to misuse of surveillance in a public place: Victorian Law Reform Commission, *Surveillance in Public Places*, Report no 18, (2010) 17-18.

<sup>11</sup> ALRC, *Serious Invasions of Privacy*, above n 10, 9 [Recommendation 4-1].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* 19 [1.11]. The NSW Standing Committee on Law and Justice has recommended that a statutory cause of action for invasion of privacy be introduced into NSW law and that the action be based on the form of action proposed by the ALRC, with the exception of the fault element: NSW Standing Committee on Law and Justice, *Remedies for the Serious Invasion of Privacy in New South Wales*, Report, 3 March 2016, 71 [Recommendation 4]. In terms of the fault element, the NSW Standing Committee on Law and Justice has suggested that the NSW Parliament consider whether a wider fault element, encompassing negligence, should be applicable to governments and corporations: NSW Standing Committee on Law and Justice, at 71 [4.82]. The South Australian Law Reform Institute has also recommended the introduction of a statutory tort for serious invasions of privacy which is similar to the form of the action recommended by the ALRC: South Australian Law Reform Institute, above n 10, 16.

<sup>14</sup> ALRC, *Serious Invasions of Privacy*, above n 10, 12 [Recommendation 12-1].

<sup>15</sup> *Ibid* 13 [Recommendation 12-9].

<sup>16</sup> *Ibid* 251 [12.149].

injunctive relief at any stage of the proceedings.<sup>17</sup> This would allow courts to issue interlocutory and final injunctive relief on such terms as they think fit.<sup>18</sup>

## 1 *Key Benefit*

The design of the cause of action proposed by the ALRC takes into account access to justice issues by recommending that the Privacy Commissioner be given enhanced powers to investigate complaints about serious invasions of privacy and to make appropriate declarations, which could include a declaration that material should be removed (or taken-down) from the internet. Enforcement of those declarations would, however, require reference to a court.<sup>19</sup> These recommendations are intended to complement the introduction of a statutory tort and provide a ‘low cost alternative to litigation’.<sup>20</sup> The ALRC has also suggested that consideration be given to permitting state and territory tribunals to hear matters arising from the cause of action for invasion of privacy.<sup>21</sup>

The proposed action also seeks to balance the ‘right’ to privacy with the rights and freedoms of others by requiring a court to be satisfied that the public interest in privacy outweighs any countervailing public interest.<sup>22</sup> As an element determining actionability, it will be for the plaintiff to establish that their interest in privacy outweighs any countervailing public interest. This places a greater onus on plaintiffs than would be the case if public interest considerations operated instead as a defence to the action. The ALRC has stressed that while freedom of expression may be ‘the most common interest at stake’, a range of public interests may need to be considered in balancing the privacy interest.<sup>23</sup> A non-exhaustive list of public interest matters that a court can consider is set out in the ALRC’s report, which stresses that ‘no one interest should have automatic priority over the privacy interest of the plaintiff’.<sup>24</sup> While various public interests at stake in any particular matter, including privacy interests, should therefore be placed on a *relatively* ‘equal footing’, the ALRC has nevertheless observed that ‘[i]f anything, by requiring the plaintiff to satisfy the court that the public interest in privacy *outweighs* any countervailing public interest, the scales may be tilted slightly in favour of free expression and other public interests.’<sup>25</sup>

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<sup>17</sup> Ibid 13 [Recommendation 12-7].

<sup>18</sup> Ibid.

<sup>19</sup> Ibid 310 [Recommendation 16-1].

<sup>20</sup> Ibid. That justice to protect privacy should be accessible is one of the guiding principles enumerated by the ALRC in its report: Ibid 38.

<sup>21</sup> Ibid 164 [Recommendation 10-1].

<sup>22</sup> Ibid 144 [Recommendation 9-1]. See also ALRC, *For Your Information*, above n 10, 2584 [Recommendation 74-2].

<sup>23</sup> ALRC, *Serious Invasions of Privacy*, above n 10, 146 [9.17].

<sup>24</sup> Ibid 148 [9.27].

<sup>25</sup> Ibid 149 [9.31].

In practice, the broad interpretation proposed by the ALRC of ‘freedom of expression’<sup>26</sup> and the fact that the scales are possibly ‘tilted slightly in favour of free expression and other public interests’ may make it very difficult for an individual to establish that their interest in ‘privacy’ outweighs the interests of another in publishing images.<sup>27</sup> Nevertheless, where the balance to be struck is between the privacy interests of a plaintiff who is a child, on one hand, and the interests of an organisation or an adult individual, on the other, it is possible that courts will favour the child’s privacy interests. Certainly there is evidence of this in privacy cases heard in England and, as Hughes has written, ‘children may require greater and different privacy protection than adults’.<sup>28</sup> So, for example, in *Weller*, the High Court noted that when considering the rights of children in relation to matters of privacy, courts must have regard to the judgment of Lord Kerr in *ZH (Tanzania) v Secretary of State for the Home Department*<sup>29</sup> where he stated:

in reaching a decision that will affect a child, a primacy of importance must be accorded to his or her interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed, unless countervailing reasons of considerable force displace them.<sup>30</sup>

However, as Tobin has observed: ‘ultimately the adoption of a substantive rights approach begins with the capacity to conceptualise a dispute through the eyes of a child — a task which, for judges and lawyers, can often prove difficult.’<sup>31</sup> Of course where the defendant is also a child, the balancing exercise arguably becomes more complex.

To the extent that the proposed statutory cause of action takes into account access to justice issues and balances the public interest in privacy with other matters of public

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<sup>26</sup> In terms of the content to be given to the countervailing interest in freedom of expression, the ALRC advocates for a broader conception of that interest than is entailed in the implied constitutional right to political speech as recognised in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. Freedom of expression would specifically include freedom of political communication, as well as artistic expression. Freedom of the media, particularly its ‘freedom to responsibly investigate and report matters of public concern and importance’, is also specifically listed as a public interest matter that courts should take into account when balancing the privacy interest: *Ibid* 10–11 [Recommendation 9.2]).

<sup>27</sup> Cf David Rolph, ‘Towards an Australian Law of Privacy: The Arguments For and Against’ (2012) 31(4) *Communications Law Bulletin* 9, 12: noting that there is understandable concern that a privacy action may have serious consequences for freedom of expression and of the press, particularly given the lack of a ‘comprehensive constitutional or statutory protection for freedom of expression’.

<sup>28</sup> Kirsty Hughes, ‘The Child’s Right to Privacy and Article 8 *European Convention on Human Rights*’ in Michael Freeman (ed) *Law and Childhood Studies: Current Legal Issues*, Vol 14 (Oxford University Press, 2012) 456, 456.

<sup>29</sup> *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 [46].

<sup>30</sup> *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [78] (Dingemans J), referring also to *K v News Group Newspapers Ltd* [2011] EWCA Civ 439.

<sup>31</sup> John Tobin, ‘Judging the Judges: Are they Adopting the Rights Approach in Matters Involving Children?’ (2009) 33(2) *Melbourne University Law Review* 579, 625.

interest, it is well designed. Despite this, the action for serious invasion of privacy, in the form proposed by the ALRC, would overall be of limited benefit in addressing the problem with which this thesis is concerned. This is primarily because the action is limited to situations in which the image subject is able to demonstrate a reasonable expectation of privacy in all the circumstances. In cases involving publication of images, this requirement is likely to rule out an action in most cases where an image has been captured in public, unless the image reveals something inherently private or humiliating and embarrassing.<sup>32</sup> The ALRC recognises, however, that '[t]here may be different expectations of privacy with respect to the taking of a photograph and its later publication', and that while it may be unreasonable to expect not to be photographed in public, it may be reasonable to expect the photograph not to be published, 'particularly if the photo captures a clearly private or humiliating moment.'<sup>33</sup> An example of this is where an image of a person is captured at the moment her skirt is blown up, revealing her underwear.<sup>34</sup>

A more difficult question is whether unauthorised publication of information that is not inherently private or embarrassing is capable of rendering the information private where it otherwise would not have been.<sup>35</sup> Ultimately, it would be for courts to resolve that

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<sup>32</sup> Although the ALRC has suggested that a reasonable expectation of privacy can arise even when an activity takes place in public, in certain circumstances, it is evident from the examples given by the ALRC that it favours the attachment of a reasonable expectation of privacy to public activities only in limited circumstances, such as where publication would reveal sensitive or humiliating facts: ALRC, *Serious Invasions of Privacy*, above n 10, 100 [6.50]. In its previous recommendations for a statutory tort of invasion of privacy, the ALRC had also suggested that a reasonable expectation of privacy might exist in a public place where unauthorised surveillance was involved: ALRC, *For Your Information*, above n 10, 2565 [74.119]. It appears the ALRC may also support the existence of a reasonable expectation of privacy in a public place where intrusion into private life occurs due to an element of harassment, this is suggested by the fact that the ALRC expresses its preference for a restrictive interpretation of the European Court of Human Rights' decision in *Von Hannover v Germany* [2004] IV Eur Court HR 41 such as that suggested by Gavin Phillipson: ALRC, *For Your Information* at 2548 [74.127] and 2548 [74.52]–[74.53], citing Gavin Phillipson, 'The "Right" of Privacy in England and Strasbourg Compared' in Andrew T Kenyon and Megan Richardson (eds) *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2010) 184, 210–11. The ALRC also does not expressly state whether it agrees that a risk of harm would sufficient to create a reasonable expectation of privacy, even where the claimant is a child. However, the ALRC refers to the decision in *Hosking* in which the majority of the New Zealand Court of Appeal held that there was no general expectation of privacy when a person is photographed on a public street but were prepared to countenance exceptions such as where there may be a real risk of harm to the subjects of the image: ALRC, *For Your Information* at 2567 [74.125] citing *Hosking* [2005] 1 NZLR 1 [164] (Gault P and Blanchard J), [260] (Tipping J).

<sup>33</sup> ALRC, *Serious Invasions of Privacy*, above n 10, 101 [6.50]. This is a clear reference to situation such as that occurring in *Peck* [2003] I Eur Court HR 123 where the plaintiff was captured on CCTV in the aftermath of an attempt on his own life, at 143.

<sup>34</sup> ALRC, *Serious Invasions of Privacy*, above n 10, 100 [6.46], referring to *Daily Times Democrat v Graham*, 276 Ala 380 (1964) 478.

<sup>35</sup> One example is the publication of images captured by CCTV cameras that are later published on a social media page, without the knowledge and consent of the image subject and for a purpose unrelated to the purpose for which they were captured. These were the facts presented in the case of *Saad*, discussed in Chapter Three (see n 16 of that Chapter) where, in deciding that the plaintiff's claim for invasion of privacy (albeit at common law) should not be struck out, Hall J stated that it was at least arguable that a person would have an expectation of privacy where CCTV images were used for a purpose beyond that for which they had been obtained, even where the image was taken in a public place and did not depict the plaintiff

question. Courts could decide that information which is not otherwise private could be considered so because of the way in which it has been used (or rather misused), for example, where it is used for purposes beyond those for which it was collected. The ‘repurposing’ of information is illustrated in a number of the case studies presented in Chapter Four, namely Case Study Three (Alison), Case Study Four (Shabeeha) and Case Study Seven (Schoolboy Rowers), as well as in the *Saad* case discussed in Chapter Three. Even in situations where images captured for one purpose are used for another, the nature of the information itself is likely to be a central factor in determining whether information is private, albeit not the only factor. Indeed, the ALRC refers to the fact that in the United Kingdom the nature of the information is ‘plainly of considerable if not prime importance’ and that ‘it may even be decisive in the question of whether the claimant enjoys a reasonable expectation of privacy in respect of it.’<sup>36</sup> It is telling that examples given by the ALRC of disclosures that would constitute an invasion of privacy within the scope of the proposed cause of action all relate to information that is *inherently* private or to images that capture the plaintiff in an intimate or embarrassing moment.<sup>37</sup> It should be noted, also, that the ALRC has recommended that the appropriation of a person’s name or likeness or the presentation of a person in a false light be specifically excluded from the cause of action. That is, these things are excluded unless the publication or use of the information constitutes a misuse of private information, or the information itself was gathered in circumstances amounting to an intrusion upon seclusion.<sup>38</sup>

If courts were to adopt the ALRC’s approach to determining whether a plaintiff had a reasonable expectation of privacy, it is a fair supposition that even extensive and unanticipated publication given to information that is not otherwise private, or the repurposing or re-contextualisation of such information, will not, in and of itself, render that information private for the purpose of the cause of action. This would then be a considerable limitation of the action in terms of reducing the vulnerability of children to harm from the unwanted online publication of an image or its subsequent use. Referring back to the case studies set out in Chapter Four, it would be unlikely that any of the image subjects — with the exception of Jackie in Case Study One — would be able to satisfy the reasonable expectation of privacy test. That is because in all of those case studies — with the exception of Case Study five (Tyger and Lilly) — the images are captured in public and convey nothing inherently private, or anything that would likely be regarded as ‘clearly

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engaged in a ‘private activity’: *Saad* [2012] NSWSC 1183 (4 October 2012). Although counsel for the plaintiff had argued that there could be no expectation of privacy vis-a-vis information which was not inherently private: *Saad* [168], [183] (Hall J).

<sup>36</sup> ALRC, *Serious Invasions of Privacy*, above n 10, 99 [6.38].

<sup>37</sup> *Ibid* 85–87 [5.56]–[5.66], 116 [7.36].

<sup>38</sup> Both the NSW Standing Committee on Law and Justice and the South Australian Law Reform Institute have also recommended that any statutory cause of action for invasion of privacy introduced into the law of their respective jurisdictions also be confined to invasions of privacy that involve an intrusion upon seclusion on the misuse of private information: NSW Standing Committee on Law and Justice, above n 13, 71 [Recommendation 4]; and South Australian Law Reform Institute, 10, 17 (respectively).

private or humiliating’.<sup>39</sup> Although the image subject concerned might be humiliated by publication of the images, the test, being objective, would not take this subjective response into account. In the case of Tyger and Lilly (Case Study Five) the photograph of the young children was taken by their own mother, who was also responsible for initially publishing that image online. One of the difficulties this scenario presents, as discussed earlier in Chapter Four, is that the children’s expectations of privacy (in so far as a young child can be said to have any expectation of privacy)<sup>40</sup> may be diminished by the fact that their mother posted the photograph on a public Facebook page.

Aside from difficulties in establishing a reasonable expectation of privacy, the image subjects in Case Studies Two to Eight would also be unlikely to establish the other elements of the statutory tort — including the need to establish that the invasion was serious and that the invasion of privacy was intentional or reckless.

The ALRC makes clear that the test of seriousness is an objective one: it does not concern the plaintiff’s subjective view of seriousness, or even the plaintiff’s actual experience (such as suffering serious harm as a result of the invasion or privacy or misuse or disclosure of private information).<sup>41</sup> Yet, as demonstrated in Chapter Two, an individual’s self-esteem can be negatively affected by their purely subjective response to an image — this is because self-esteem is dependent, in part, on how an individual perceives others reactions to a particular image. It was also demonstrated that an individual may experience a lack of control, in turn potentially impacting on self-esteem, even when an image is not inherently embarrassing, harmful and so on. As such, an action for invasion of privacy, which depends on an objective test of ‘privacy expectations’ as well as seriousness, is probably ill-suited to address the risks of harm related to the unwanted online publication of an image or its subsequent use, as explained in Chapter Two.

In terms of the need to demonstrate intention or recklessness on the part of an image subject, Chapter Two also illustrated that an individual can experience a lack of control even when others are well-intentioned in their decision to post or share images of that

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<sup>39</sup> Nevertheless, it is useful to note that in its submission to the NSW Standing Committee on Law and Justice inquiry into Remedies for Serious Invasions of Privacy in NSW, the organisation, Women’s Legal Services of NSW noted that ‘an image of a woman without her religious headscarf can cause harm to a victim if they are shared or threatened to be shared without consent’ and urged the Standing Committee to ‘give these forms of invasions of privacy serious consideration and to recognise the serious impact sharing images such as these could have on the victim: Women’s Legal Services NSW, Submission No 32 to NSW Standing Committee on Law and Justice, *Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales*, 3 March 2016, 5 [11].

<sup>40</sup> The reasonable expectation of privacy test, expressed by the ALRC, is an objective test that requires a court to consider not whether the plaintiff subjectively expected privacy, but ‘whether it would be reasonable for a person in the position of the plaintiff to expect privacy’: ALRC, *Serious Invasions of Privacy*, above n 10, 92 [6.7]. In determining a plaintiff’s reasonable expectations, the age of the plaintiff will be a relevant consideration: ALRC, *Serious Invasions of Privacy* at 96 [Recommendation 6.2(g)]. The common law approach to this question is also instructive — as to which see Chapter Four Case Study Five (Tyger & Lilly).

<sup>41</sup> ALRC, *Serious Invasions of Privacy*, above n 10, 134 [8.18].



individual, or when the images are not inherently embarrassing or harmful and so on. Therefore, the cause of action proposed by the ALRC will provide no remedy when images have been posted by a person who is not objectively aware of the circumstances giving rise to an invasion of privacy.

The need to establish intention or recklessness has another important consequence in terms of the efficacy of the action in addressing the risk of harm described in this thesis. The fact that an internet intermediary does not know that its service has been used to invade privacy means it will not possess the requisite fault to ground an action against it.<sup>42</sup> The ALRC observes that the statutory action is ‘not intended to impose liability for mere omissions — that is, failing to stop an invasion of privacy by a third party.’<sup>43</sup> However, it does seem to be the ALRC’s intention that if an internet intermediary becomes aware of an invasion of privacy and does not take reasonable steps to remove invasive material within a reasonable time, it may be taken to possess the requisite fault element to ground the action.<sup>44</sup> In practical terms, however, there are important questions about when an internet intermediary should be taken to be aware of the privacy invasive nature of material. If awareness will only be imputed once the intermediary receives notice of a declaration or court order to that effect, this necessarily impacts on the efficacy of the cause of action, because it means there is a potential for privacy invasive material to remain available online for a considerable length of time. The longer material is available, of course, the more opportunity there is for its broader dissemination and for others to download the material. On the other hand, internet intermediaries may be prepared or perhaps even encouraged to remove material claimed to be invasive of privacy on receiving notice from a person affected, even before any court order is issued or even before proceedings are commenced. If the latter were the case then the introduction of a cause of action for serious invasions of privacy could result in a greater number of images being removed than might be the case if internet intermediaries awaited the outcome of court proceedings before making a decision. That would, in turn, give children a greater level of control over their image in the online environment.<sup>45</sup>

The efficacy of the cause of action proposed by the ALRC is also affected by the proposal that a defence be available where the would-be defendant is a child or young person below an age to be specified by the legislature.<sup>46</sup> The ALRC itself does not recommend a particular age but offers its ‘tentative view’ that the age of 16 is appropriate.<sup>47</sup> The

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<sup>42</sup> Ibid 208 [11.101]–[11.102]. Likewise, an internet intermediary who is not reasonably able to prevent the invasion of privacy will not be considered to intend the invasion, and is unlikely to be considered ‘reckless’.

<sup>43</sup> Ibid 208 [11.101].

<sup>44</sup> See further *ibid* 208 [11.103] and 210 [11.16]: noting that the ALRC does not regard a ‘safe harbour’ scheme as necessary — given the fault element of the action — but that if one was designed a condition of reliance would be acting to remove privacy invasive material on receiving notice to do so.

<sup>45</sup> It would also be likely, however, to give rise to concerns that the public interest in free expression would not be adequately protected and that the intermediaries themselves are ill-placed to make determinations.

<sup>46</sup> ALRC, *Serious Invasions of Privacy*, above n 10, 187 [Recommendation 11-8].

<sup>47</sup> Ibid 213 [11]–[131].

rationale behind this recommendation is that the ALRC believes that education on the risks and ethical dimensions of invading another's privacy is more appropriate than the imposition of civil liability.<sup>48</sup> Without arguing with the rationale behind this, a defence or exception for young people would further limit the extent to which this action addresses the risk of developmental harm related to the online publication of an image or the subsequent use of such an image. This is because those responsible for capturing and subsequently publishing images of children are very often other children.<sup>49</sup>

## 2 Conclusion as to Efficacy of this Option

Although a statutory tort for serious invasions of privacy would give children greater control over their image than they currently enjoy, including in the online environment, on balance the action is likely to do little to address the problem with which this thesis is concerned. As discussed, the action is limited to situations in which the image subject is able to demonstrate a reasonable expectation of privacy in all the circumstances. In cases involving publication of images, this requirement is likely to rule out an action in most cases where an image has been captured in public, unless the image reveals something inherently private or humiliating and embarrassing. The objective nature of the test cannot account for a given image subject's subjective wishes in relation to the online publication or subsequent use of an image. As also noted above, a would-be plaintiff will also need to demonstrate that any invasion of privacy was serious, and that their privacy interest outweighs the public interest in other matters, including freedom of expression. This sets the bar fairly high and the ALRC has acknowledged the elements of the action present 'significant hurdles' for plaintiffs. Given the range of remedies that are proposed be made available to a court (or regulator) in respect of an invasion of privacy, which includes the payment of compensation, and given that a plaintiff need not demonstrate actual physical or mental harm as a result of the invasion, it is understandable that the bar should be set high. Ultimately, an action for invasion of privacy should never be available as a remedy unless the harm can be assessed objectively. Without an objective standard, it would be impossible for people to determine in advance whether a particular

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<sup>48</sup> Ibid 211 [11]–[121]. It is also interesting here to note that the right to freedom of expression in the *CRC*, although similar in wording to Article 19 (Freedom of Expression) in the *ICCPR*, does not include the first sentence of paragraph 3 of Article 19 of the *ICCPR*: "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities." According to the Special Rapporteur, 'The inclusion of this sentence, which was introduced in the Covenant because of the powerful influence of modern media of expression, was apparently not found necessary with regard to the child's freedom of expression': Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/69/335 (21 August 2014) (focusing on the right of the child to freedom of expression) 6.

<sup>49</sup> Many images are captured with ease by the use of camera facilities included in mobile phones. As noted by the Australian Government in 2014, 'Australia ... has one of the highest rates of mobile phone ownership in the world. Children have extensive access, with around a third of children between the ages of 5 and 14 having access to their own mobile phone': Commonwealth of Australia, Department of the Prime Minister and Cabinet, *A Commonwealth Cause of Action for Serious Invasion of Privacy*, Issues Paper (September 2011) 9.

act (or, specifically, the online publication of an image or its subsequent use in a different context) would constitute an invasion of privacy. In view of these limitations, other possible law reform options are considered below.

### B *Amendment of the Privacy Act to Include a Requirement to Delete Information*

Another way to partially address the problem with which this thesis is concerned is to insert a requirement into the *Privacy Act* on the part of APP Entities to delete personal information in certain circumstances. A new APP regarding the deletion of personal information could take various forms. In its issues paper on serious invasions of privacy in the digital era, the ALRC canvassed the introduction into the *Privacy Act* of a requirement for data controllers to ‘permanently delete information at the request of an individual who is the subject of that information’.<sup>50</sup> This requirement to delete data was proposed in order to address what the ALRC termed the ‘loss of control’ over information. The ALRC noted that one possible solution to the loss of control was the ‘right of erasure and to be forgotten’ recently proposed in Europe. That ‘right of erasure and to be forgotten’ was, at the time of the ALRC report, being considered by the European Union in the context of its proposed new European Regulation on Data Protection.<sup>51</sup> The new Regulation has now been adopted by the European Parliament.<sup>52</sup> The form of a new APP requiring APP Entities to delete information in certain circumstances could, therefore, be modelled on the right of erasure and to be forgotten in the Proposed Data Protection Regulation, which has been included as Article 17.<sup>53</sup>

In order to closely resemble Article 17,<sup>54</sup> a new APP regarding erasure of personal information would provide, in essence, that where the collection of personal information or its use or disclosure for a particular purpose is dependent upon the information subject

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<sup>50</sup> ALRC, *Serious Invasions of Privacy in the Digital Era*, Issues Paper no 43 (October 2013) 50 [170].

<sup>51</sup> ALRC, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper No 80 (March 2014) 223 [15.23], referring to COM 2012/011 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) (‘COM 2012/011’), art 17.

<sup>52</sup> COM 2012/011, above n 51.

<sup>53</sup> In its Issues Paper, *Serious Invasions of Privacy in the Digital Era*, the ALRC had noted that one possible solution to the problem of the loss of control over personal information was to give individuals a right to permanently delete their personal information at their request: ALRC, Issues Paper no 43, above n 50, 50 [170]. However, in its Discussion Paper, the ALRC proposed the inclusion in the *Privacy Act* of a right of erasure that was significantly narrower than the right of deletion referred to in its issues paper; that is, the ALRC proposed that individuals should only be able to call for the deletion of information that they themselves had provided to the data controller: ALRC, Discussion Paper No 80, above n 51, 223. In its final report, however, the ALRC accepted that amending the *Privacy Act* even to include such a limited right was premature and would need further consideration: ALRC, *Serious Invasions of Privacy*, above n 10, 321 [16.51]. An APP requiring only the deletion of personal information provided by a data subject themselves would do very little to address the problem with which this thesis is concerned. That is because images, as a form of personal information, are often not provided by an image subject themselves, but by others.

<sup>54</sup> The text of that Article cannot be directly translated into the *Privacy Act*, given the difference between Australian and European privacy laws, particularly as regards terminology and grounds of lawful collection and use of data.

having provided consent, the subject should be able to withdraw consent and require the deletion of the personal information or a restriction on the use or uses to which it is put, or the further disclosure of that information.<sup>55</sup> Where collection, use or disclosure of personal information is not dependent upon the information subject's consent, the subject should have the right to object to the retention of their information, or its use for a particular purpose or purposes, or its further disclosure.<sup>56</sup> Where an information subject does object, an APP Entity would then be required to delete the information or cease using it for the purpose or purposes specified in the notice of objection or further disclosing the information. However, this would not be required if there were compelling overriding legitimate grounds for retaining or continuing to use or disclose the personal information.<sup>57</sup> In addition, an APP entity would be obliged to delete personal information or restrict its use or disclosure where that information is no longer necessary for the purpose or purposes for which it was collected or used or where the APP Entity has collected, used or holds the information in a way that does not comply with the APPs.<sup>58</sup>

If it were to reflect Article 17, the requirement to erase or restrict the use of personal information would also be subject to exceptions. Erasure or restriction on use of information would not be required where (among other things) retention of the personal information or its use or disclosure for a particular purpose or purposes was necessary for freedom of expression and information, to comply with legal requirements, or for archiving or scientific, statistical or historical purposes.<sup>59</sup>

If the *Privacy Act* was amended to insert a new APP in the form outlined above, it is possible that the OAIC could issue detailed guidance on the question of what legitimate grounds would be considered compelling and sufficient to override the interests, rights and freedoms of the information subject. That is, where such grounds exist, personal information could be retained or continue to be used or disclosed despite objection on the part of the information subject.<sup>60</sup> It is possible that images would be considered a special case, given their impact, in which case guidance could be provided as to specific

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<sup>55</sup> COM 2012/011, above n 51, art 17(1)(b).

<sup>56</sup> Ibid art 17(1)(c).

<sup>57</sup> Ibid and art 19(1). A data subject should always be able to object to information used for the purpose of direct marketing: Ibid and art 19(2). However, an information subject should not be permitted to object where the collection and/or use or disclosure of the personal information is necessary for the performance of a contract to which the subject is party or in order to take steps at the request of the subject prior to entering into a contract; or is necessary for compliance with a legal obligation to which the APP Entity is subject: this corresponds with COM 2012/011, above n 51, art 17(1)(c) and art 19(1) – right to object related to processing based on art 6(d), (e) and (f) only (ie excluding processing necessary for performance of a contract or compliance with a legal obligation, as above).

<sup>58</sup> To correspond with COM 2012/011, above n51, art 17(1)(a) and (d) respectively.

<sup>59</sup> Ibid art 17(3).

<sup>60</sup> The Information Commissioner has power to make guidelines 'for the avoidance of acts or practices that may or might be interferences with the privacy of individuals, or which may otherwise have any adverse effects on the privacy of individuals' under the *Privacy Act* s 28(1)(a), although such guidelines do not take effect as a legislative instrument: s 28(4).

situations in which the image subject's interest would generally be considered to override the legitimate interests of the APP Entity or a third party. The subject or subjects of an image, its nature, the medium of publication and the context of publication could all be taken into account. For example, it might be that a strong presumption should be made in favour of requiring the erasure of images that depict a child,<sup>61</sup> particularly where those images are posted online.<sup>62</sup> A presumption in favour of erasure could also arise where images are inaccurate — that is, they have been falsified (doctored) so that they appear to depict something other than what was actually captured on film; and where images are invasive of 'privacy' (however defined) or depict nudity or partial nudity or are published in sexualised or voyeuristic contexts. For example, in Case Study Four, Shabeeha's interests in having her photograph deleted could be considered to override the interest of the other person depicted, the person who took the photograph and the person who uploaded it, as well as the internet content host that controls publication, or its users. This is on the basis that the photograph had been altered to 'depict' something that did not actually happen.<sup>63</sup> Likewise, the interests of the schoolboy rowers (Case Study Seven) in having the use of their image on a gay voyeuristic blog restricted might be considered to outweigh the legitimate interest of any APP Entity that hosts the blog.<sup>64</sup> This would be on the basis that the context of publication sexualises the image subjects and as a result is likely to cause distress and embarrassment. In other cases the interests of the image subject might not be considered to override those of the APP Entity or third parties. A case could be made in relation to Harry (Case Study Eight), for example, that the legitimate

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<sup>61</sup> In its draft report on the Proposed Data Protection Regulation, the Committee on Civil Liberties, Justice and Home Affairs set out a list of situations in which the interests of a data controller would, as a rule, override those of a data subject, as well as a list of situations where the interest, rights and freedoms of a data subject would generally override those of the data controller: Committee on Civil Liberties, Justice and Home Affairs, *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM (2012) 0011 – C7-0025/2012 – 2012/0011(COD)*, 2012/0011 (COD) (17 December 2012) 73. The Committee considered that the interests, rights and freedoms of the data subject should generally be considered to override those of the data controller where, among other things, the processing causes a serious risk of damage to the data subject, and where the data is a child: Committee on Civil Liberties, at 73. The regulation adopted by the European Parliament in April 2016, however, does not reflect this amendment. However, it is noted in COM 2012/011, above n 51, [Recitals] that: 'The legitimate interests of a controller may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding. This would need careful assessment in particular where the data subject is a child, given that children deserve special protection.'

<sup>62</sup> One of the guiding principles behind the APPs is that they should be technology-neutral: see ALRC, *For Your Information*, above n 10, vol 1, 34 [Recommendation 18-1(b)]; OAIC, *Australian Privacy Principles Guidelines*, 31 March 2015, 3 [A.7]. One reason for this is that they are sufficient relevant and adaptable to emerging technologies or applications of technology: OAIC, *Australian Privacy Principles Guidelines*, at 3 [A.7]. However, similar concerns do not apply in relation to guidance issued in relation to the *Privacy Act*.

<sup>63</sup> And would in any event be contrary to the social media service's own terms and conditions (as outlined in Chapter Four (Case Study Four)).

<sup>64</sup> Although as noted in Chapter Three, Part Three (Federal Information Privacy Laws) it is not clear either that the hosting service would be considered an APP Entity or that the photograph would constitute 'personal information' within the meaning of the *Privacy Act*.

interests of the social media company publishing his image, as well as third parties using the service to post or access the image, and the person who captured and uploaded it, override Harry's interest in it not being published. The photograph is not offensive, objectionable, or embarrassing and does not depict nudity or sexualise the image subject. Likewise, it may be considered that the interest of free information and news reportage should override any interests that Ben (Case Study Six) may have in seeking the removal of his image from social media.<sup>65</sup> Other cases, such as that of Tim (Case Study Two) are probably less clear-cut. However, it is possible that consideration could be directed specifically to the circumstances of individuals raising an objection. In other words, the actual impact and reasons for objecting to the ongoing disclosure or use of an image upon a particular information subject could be taken into account in striking the balance between the data subject's interests and those of the APP Entity or third parties. For example, if an individual were able to demonstrate that they had been subjected to ongoing teasing as a result the image, or if they had been rejected by their community because of it, this could weigh in favour of requiring deletion of the image in question.

A case-by-case determination as to where the balance should be struck would allow a nuanced weighing of the interests, rights and freedoms of the various actors. However, if the OAIC were required to make determinations on a case-by-case basis, this would also entail an additional cost burden for the taxpayer. If it were for APP Entities themselves to undertake a case-by-case consideration, this would involve significant additional costs for the APP Entity. A determination that involved consideration of factors specific to the case at hand would also lead to some uncertainty for APP Entities as it would be difficult or impossible to predict in advance what personal information (or images) would need to be deleted upon receipt of a request. Nevertheless, the OAIC could be charged with developing detailed guidance in this area.

## 1 *Key Benefits*

An obligation on the part of APP Entities to erase personal information or restrict its use and disclosure in the circumstances outlined above would go some way to giving children greater control over their image and thereby to reducing their vulnerability to harm arising from unwanted publication. This is especially so if any new APP was underpinned by specific guidance or subordinate legislation specifically relating to images of children. Nevertheless, there are significant limitations associated with this option.

First, the obligation to delete information would do little to prevent publication in the first place and would also be unlikely to influence social norms around the publishing of images of children.<sup>66</sup> Secondly, the efficacy of a requirement to delete or restrict the processing

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<sup>65</sup> As noted in Chapter Four (Case Study Six), he would be unable to seek erasure etc under the *Privacy Act* from the news website as media organisations acting in the course of journalism are not subject to the *Privacy Act*.

<sup>66</sup> Equally, however, the introduction of such a right would be unlikely to have a chilling effect on expression.

of personal information is also limited by the fact that the *Privacy Act* does not generally apply to the acts and practices of individuals or small businesses.<sup>67</sup> As such, unless the *Privacy Act* were amended to apply to individuals, the inclusion of a requirement to delete personal information would not prevent individuals from simply re-posting or republishing personal information that had previously been erased (or the processing of which restricted). Moreover, the publication or use of images on websites and blogs operated by individuals or small businesses would not be covered by the requirement. This represents a very significant obstacle to effective enforcement of the APP in the context of user-generated content. Given that many of the problems related to image use arise because of the popularity of social media sites, the usefulness of an APP requiring erasure or restriction on the use or disclosure of personal information has to be considered limited. However, internet content hosts that provide platforms allowing others to post information (such as social networking sites) do have the ability to disable the accounts of users who repeatedly infringe individual's privacy and may be able to rely on these terms and conditions, or bring in amendments to them, in order to disable the accounts of users who re-post information that had been erased pursuant to the *Privacy Act*. In practice, however, organisations are likely to be reluctant to disable accounts of repeat 'infringers' on this basis because it would be both costly and unpopular with the organisation's own clients.

It is also possible that this limitation could be overcome by design: in other words, a 'code' solution might be found. One possibility, for example, is the use of face recognition technology to allow for the automated detection and removal of images that are re-posted online after the image or a similar image had been removed from view, due to a requirement to restrict the use or processing of information (but not to delete it entirely) pursuant to the *Privacy Act*. Of course, such a solution would present its own difficulties — not least the fact that face recognition technology requires the persistence of personal information in order to operate and that it is considered, by some, inherently invasive of privacy.<sup>68</sup> Ironically, then, using this particular code solution to provide individuals with a measure of control over one aspect of their personal information (how their images are displayed) may result in the loss of control over another aspect (the persistence of

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<sup>67</sup> *Privacy Act* ss 7B(1) and ss 6C, 6D (respectively). Note, however, that small business operators that handle certain information, such as health information, will not be exempt even if their turnover threshold is lower: s 6D(4).

<sup>68</sup> Anna Bunn, 'Facebook and Face Recognition: Kinda Cool, Kinda Creepy' (2014) 25(1) *Bond Law Review* 35, 41–5. Another alternative might be the sharing of unique digital fingerprints, or hashes, in relation to an image. Recently, Google, Facebook, Twitter and Microsoft have agreed to work together to share 'hashes' for images and videos promoting terrorism — this would allow the ready identification and removal of such content from networks: Olivia Solon, 'Facebook, Twitter, Google and Microsoft Team Up to Tackle Extremist Content', *The Guardian* (online), 6 December 2016 <<https://www.theguardian.com/technology/2016/dec/05/facebook-twitter-google-microsoft-terrorist-extremist-content>>.

personal information). It is, however, possible that other ‘code’ solutions exist or could be found.

Using the mechanism of guidance or possibly subordinate legislation in the form of Regulations applicable to images of children<sup>69</sup> to address particular issues in relation to images could be an effective way of balancing an image subject’s subjective wishes with broader interests. However, wherever a balancing exercise occurs, there is a risk that the balance will be struck against the image subject, in which case there is still a risk of harm to that particular individual. The only way to avoid that risk entirely, therefore, would be to include a general right on the part of all image subjects (or on the part of image subjects who are children) to require the deletion of personal information in the form of images upon request. Such a broad right would likely attract strong criticism on the basis that it would be a significant restriction on freedom of expression and information. Such a broad right might also have an ultimately detrimental impact on children’s development — images of children are often captured and published by other children, so the erasure of images would impact on the freedom of expression of the child capturing and publishing the image and arguably, therefore, on their development. It would also give rise to complex considerations in situations where more than one image subject is depicted, but only one of them wishes the image to be removed. It would also likely result in a high burden for business, particularly for internet content hosts, which is explored further below. That is not to say that further consideration should not be given to the question of whether a child *should* have a right to require erasure of their image solely based on their subjective wish. Depending on the extent of the harm attendant on the unwanted online publication of images, or their use, such a right may ultimately be considered in the best interests of children, and therefore in the public interest. However, from a pragmatic point of view, there is insufficient evidence available at present to overcome the likely objections to such a wide-ranging right. This is one reason why further research on the risks of harm relating to the unwanted publication of images is needed.

The draft of Article 17 of the Proposed Data Protection Regulation does not require a data controller to delete data in any case where its processing is ‘necessary’ for exercising the right to freedom of expression or information. This is a broad exception as it applies even where there are no lawful grounds for the processing of data, as well as in situations where a data subject has objected to the processing of data and the data subject’s interests have been determined to override the interests of the data controller. In other words, in the context of the right of erasure and to be forgotten in the Proposed Data Protection Regulation, freedom of expression and information operates as a ‘trump card’. Drafting an APP requiring the deletion of information or a restriction on its use or disclosure in certain circumstances in a similar way to Article 17 would arguably tilt the scales in favour of free expression and information. This, in turn, is likely to undermine

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<sup>69</sup> Subordinate regulation can be made pursuant to *Privacy Act* s 100.



the efficacy of the APP in addressing the problem with which this thesis is concerned. In the case of images (other than ‘selfies’), there is an inherent tension between the free expression of the person capturing the image, on the one hand, and the rights and interests of the image subject on the other. This is not to say that considerations of the broader public interest in free expression and information should not be taken into account, of course they should be. However, any amendment to the *Privacy Act* should make it clear that equal weight is to be accorded to the interests, rights and freedoms of the data subject, on the one hand, and the interests, rights and freedoms of APP Entities and third parties on the other. In order to be effective in addressing the problem with which this thesis is concerned, the *Privacy Act* (or any guidance provided or subordinate legislation issued in respect of the obligation to erase or restrict the use or disclosure of personal information in general, or images in particular) should make explicit the fact that a data subject’s freedom of expression is also implicated whenever personal information (or images) are collected, used or disclosed against their wishes.

Other factors that must be taken into account in assessing the efficacy of this option are the process around the withdrawal of consent, the making of an objection and the lodging a complaint under the *Privacy Act*, and applicable time limits.

## 2 *Conclusion as to Efficacy of this Option*

On balance it is difficult to see that the inclusion of a right to delete in the *Privacy Act* is an effective solution to the problem with which this thesis is concerned. Without consequences for individuals who re-post images that have previously been erased (or removed from publication) there is the high likelihood of an endless cycle of removal and reposting — that is, unless a ‘code’ solution to this problem is found. A requirement to erase images or restrict their processing would also not apply to the publication of images on websites, blogs and other media operated by individuals and small businesses. Given these limitations, a ‘right’ to delete images would be more effective if it was not located in the *Privacy Act* but applied more generally (such as in the context of a broad take-down scheme discussed in Section F below).

### C *Requirement to Anonymise or De-Identify Data*

The previous section considered the introduction into the *Privacy Act* of a new APP that would require APP Entities to delete personal information in certain circumstances, or restrict its use or disclosure. An alternative to that is a requirement that APP Entities anonymise or de-identify data in certain circumstances. De-identifying data would address some of the reasons why the publication of unwanted images is so harmful to development. For example, Chapter Two referred to the fact that the existence of digital images can affect a person long into the future — it can affect their job prospects and the way people regard them or react to them. If data cannot readily be linked to an individual many of these problems would be avoided. If an image is altered so that an image subject

is not recognisable in it, this would also overcome many of the harms referred to in Chapter Two. Although an individual may still experience a loss of autonomy where images have been captured or published without their consent, and although those close to the image subject may still be able to recognise them from the context, other risks of harm — including the fear of the image being seen by a broader audience — would be addressed.

## 1 *Key Benefits*

The existence of an image can represent an ongoing challenge to a person's identity claims, and can also be used to develop algorithms for face recognition purposes. If an image is de-identified, some of these problems might be avoided. De-identification could, for example, take the form of pixelating an image so that a person is not recognisable in it,<sup>70</sup> or it might involve removing tags and metadata that links a person depicted with a name and other identifying information. As Bernal has pointed out, using anonymisation or de-identification in this way could be a useful means to resolve the conflict between different rights and interests — such as where a group photograph is uploaded online and one of the image subjects wishes the image to be deleted but others do not. In this instance, the de-identification or anonymisation of information through the removal of tags could achieve an effective balance between the competing interests.<sup>71</sup> A requirement to de-identify or anonymise data could therefore be considered as a complement or alternative to a requirement to delete certain information or restrict its use or processing. However, anonymisation of images could also be required in a broader range of situations than a requirement to delete images. Anonymisation — at least in the sense of removing tags or identifying text, for example — could be the default position in relation to any image depicting a child or children. While this would not address all of the harms arising from unwanted publication, and some exceptions to the default rule would be required, overall this could reduce the impact of harm arising from the unwanted online publication of images or their subsequent use.

## 2 *Conclusion as to the Efficacy of this Option*

On balance, a requirement to anonymise or de-identify data is, if situated in the *Privacy Act*, likely to suffer from the same drawbacks as a requirement to delete data. In particular, without consequences for individuals who re-post or re-identify images that have previously been anonymised or de-identified, there is a high likelihood of an endless cycle of removal and reposting of images. Nevertheless, anonymisation or de-identification could be considered a useful complement or alternative to the 'take-down' of images, an option discussed in Section F below.

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<sup>70</sup> Although it is possible that advance face recognition technology can recognise individuals even when images have been pixelated. See, eg, ABC TV, 'Pixelating Protects Identity? Think Again', *Media Watch*, Episode 23 (9 July 2012) <<http://www.abc.net.au/mediawatch/transcripts/s3542172.htm>>.

<sup>71</sup> Paul Bernal, *Internet Privacy Rights: Rights to Protect Autonomy* (Cambridge University Press, 2014) 205.

## D *Laws That Give Effect to a 'Code' Solution to the Persistence of Data*

Another regulatory option to address the problem with which this thesis is concerned is the introduction of regulatory measures that would give effect to a 'code' solution to the persistence of data. Viktor Mayer-Schönberger, for example, has proposed the development of a technical tool that would counter the problem of digital persistence — that is, building into personal data a digital expiry date.<sup>72</sup> Mayer-Schönberger envisages that the person to whom the information relates would set or agree a date at which the 'information' would expire and should be deleted by the person or persons holding it.<sup>73</sup>

### 1 *Key Benefits*

Mayer-Schönberger's code solution is inherently problematic when applied to images of children that have been captured by others. Given that the image subject often has no control over whether the images are published and with whom they are shared, it is difficult to see how they would be empowered to determine an expiry date in relation to that information.<sup>74</sup> Nevertheless, if it were incumbent upon APP Entities or, more broadly, those with control over the online publication of personal information to set an expiry date in relation to certain data, the overall effect would be to overcome (or partially overcome) the problem of persistence. Mayer-Schönberger has suggested that the 'perfect memory' of the internet in fact impedes the ability of individuals to change themselves and that 'by recalling forever each of our errors and transgressions, digital memory rejects our capacity to learn from them, to grow and to evolve.'<sup>75</sup> As such, the permanence of online publication of unwanted images can cancel out what might otherwise be positive developmental implications of such publication. By building in tools, backed up with regulatory measures, that ensure data — or certain categories of data — are deleted after a period of time, one of the reasons why the unwanted publication of images is so potentially harmful to development is removed.

In terms of the impact of Mayer-Schönberger's code solution on the rights and freedoms of others, this would depend on how the solution was designed and implemented. Mayer-Schönberger himself envisages both a 'weak system', with only minimal protection against digital remembering, and a stricter system, which would operate more as a purpose limitation in respect of personal information. The stricter system would certainly have an impact on the economic interests of businesses (for example, by requiring them to delete information after the stipulated period) as well as on other interests, such as government

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<sup>72</sup> Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009) 104–5.

<sup>73</sup> Ibid.

<sup>74</sup> Although Mayer-Schönberger does suggest a way in which there can be 'negotiation' of expiry dates between a photographer and an image subject: Ibid 112–13.

<sup>75</sup> Ibid 77.

security.<sup>76</sup> Nevertheless, Mayer-Schönberger is of the view that digital expiry dates, unlike digital abstinence, ‘embrace participation in digital culture and global networks.’<sup>77</sup> Moreover, individuals would be able to rely on expiration dates to achieve a measure of control without having to fight ‘costly and time-consuming battles in court’.<sup>78</sup>

## 2 Conclusion as to the Efficacy of this Option

Although Mayer-Schönberger’s code solution is certainly worth further consideration in so far as it offers some solution to the problem of digital persistence, it goes only part of the way to addressing the problem with which this thesis is concerned. That is, digital persistence is only one of the reasons why the online publication or use of an image poses a risk to a child’s development. Moreover, Mayer-Schönberger himself cautions that expiration dates cannot solve entirely the problem of digital remembering, neither are they intended to.<sup>79</sup>

### E A Property-Rights Approach to Personal Information

A number of scholars have considered whether a property-rights approach to personal information might provide individuals with greater control, or self-determination, in relation to their personal information generally,<sup>80</sup> or their image in particular.<sup>81</sup> Purtova,

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<sup>76</sup> Although data retention laws aim to preserve metadata for a certain period of time. See, eg, *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth), the purpose of which, according to the Australian Government, is to provide ‘our law enforcement and security agencies with the tools they need to keep our community safe by requiring the telecommunications industry to retain a limited set of metadata for two years’: Australian Government, Attorney-General’s Department, *Data Retention* <<https://www.ag.gov.au/dataretention>>. Metadata for internet activity is described as ‘information such as an email address and when it was sent – not the subject line of an email or its content’: Australian Government, Attorney-General’s Department, *Data Retention* <<https://www.ag.gov.au/dataretention>>. Nevertheless, digital expiry dates may impact the ability of law enforcement agencies and the like to utilise information, such as digital images, for their own purposes other than to the extent that the metadata (for example, algorithms on which face recognition is based) do constitute metadata within the meaning of the relevant data retention laws: see, eg, Anna Bunn, above n 68, 42–3. Note that the Australian Government has also recently announced an increase in the use of face-recognition technology as a ‘national security weapon’: The Hon Michael Keenan MP, Minister for Justice, Minister Assisting the Prime Minister for Counter-Terrorism, ‘New 18.5 Million Biometrics Tool to Put a Face to Crime’ (Media Release, 9 September 2015) <<https://www.ministerjustice.gov.au/Mediareleases/Pages/2015/ThirdQuarter/9-September-2015-New-2418-5-million-biometrics-tool-to-put-a-face-to-crime.aspx>>.

<sup>77</sup> Mayer-Schönberger, above n 72, 114.

<sup>78</sup> Ibid

<sup>79</sup> Ibid 110.

<sup>80</sup> See generally Pamela Samuelson, ‘Privacy as Intellectual Property’ (2000) 52(5) *Stanford Law Review* 1125.

<sup>81</sup> Of course, in a number of jurisdictions — including Australia — individuals may be able to gain redress for the use of their image for commercial gain, where image is generally a broader concept than one’s visual representation in photographic or video form. In Australia this is achieved through the common law tort of passing off and, increasingly, actions under the ACL: see Chapter Three, Part Three (Actions under the *Australian Consumer Law*). In the US, by contrast, the right of publicity is designed to ‘prevent the commercial use, without a licence, of the identity of a person to attract attention to a product or advertisement’: Rosina Zapparoni, ‘Propertising Identity: Understanding the United States Right of Publicity

for example, has suggested that ‘a property-rights regime combined with non-property regulation not only deserves a second look but might even capture, and hence channel, new and otherwise difficult to control relationships with regard to personal data.’<sup>82</sup> She suggests that personal information could be treated in a way that is similar to the English system of real rights in land. That system allows for the protection and interaction of different rights and interests in the same subject matter. For example, in the case of real property the fee simple can be limited but not undermined by narrower rights (such as leases). An important benefit of the particular property-rights approach described by Purtova is that it would ensure the same degree of accountability for everyone dealing with the personal information, by virtue of the *ergo omnes* effect of the right.<sup>83</sup> The *ergo omnes* effect, as Purtova explains, means that ‘property rights have an effect against everyone by imposing negative obligations on an unidentifiable number of people without their consent.’<sup>84</sup> Purtova gives the following example, which is particularly pertinent to this thesis:

By way of example, imagine yourself walking down the street and seeing your face on a billboard advertising, say, a local rehab for drug and alcohol addicts. After recovering from the shock you vaguely remember the party where that not flattering picture of you could have been taken, a series of e-mails to everyone who attended the party circulating this and other photos of you, and your cousin posting the photo on his profile at the social network site. Who is responsible for the public appearance of the photo is not clear. However, it is not your burden to discover how the picture made it to the billboard. Due to the *erga omnes* effect of your property right in your image, anyone involved with the photo is accountable for its unauthorised use. Therefore, you approach the advertising agency, or the owner of the billboard — whoever is easy to establish as an involved party.<sup>85</sup>

In relation to images, a number of jurisdictions do adopt a property-rights approach. The right of publicity in the United States is one example. That right protects the commercial value of identity as a form of personal property.<sup>86</sup> In Europe, too, certain jurisdictions consider ‘image rights’ a form of property, or at least as a right protecting patrimonial interests.<sup>87</sup> In response to the problem of the non-consensual distribution of intimate

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and its Implications – Some Lessons for Australia’ (2004) 28 *Melbourne University Law Review* 690, 701–2 citing J Thomas McCarthy, *The Rights of Publicity and Privacy* (Thompson Reuters, 1<sup>st</sup> ed, vol 1, 1997).

<sup>82</sup> Nadezhda Nikolayevna Purtova, *Property Rights in Personal Data: A European Perspective* (PhD thesis, University of Tilburg, 2011) 236.

<sup>83</sup> *Ibid* 241.

<sup>84</sup> *Ibid* 241, citing Van Erp (reference omitted).

<sup>85</sup> *Ibid* 242.

<sup>86</sup> Zapparoni, above n 81, 692.

<sup>87</sup> See, eg, Jason Romer, ‘Face-Off: Image Rights Legislation in Guernsey’, *Legal Week* (online) 3 February 2012 <<http://www.legalweek.com/legal-week/analysis/2143524/-controversial-images-rights-law-guernsey>> (describing Guernsey Image Right); see also Tatiana Synodinou, ‘Image Right and Copyright Law in Europe: Divergences and Convergences’ 2014(3) *Laws* 181. However the nature of image rights is not always straightforward: see, eg, Elizabeth Logeais and Jean-Baptiste Schroeder, ‘The French Right of Image:

images in the United States, Bambauer has advocated a property rights solution, arguing for the insertion of a new provision into US copyright law that would allow any person represented in an intimate image<sup>88</sup> to prevent distribution and display of the image.<sup>89</sup> This right would act as a limitation on the exclusive rights of the copyright holder to distribute or display the image, and would be available in respect of private as well as public displays.<sup>90</sup> Bambauer has also suggested that this right could be non-alienable and, to that extent, would resemble the ‘moral rights’ of attribution and integrity under the relevant provisions of the US Copyright Act.<sup>91</sup>

## 1 Key Benefits

The property-rights approach to personal information in general and images in particular has many appealing aspects. Certainly, a property-rights approach to images could form the basis of a solution to the problem with which this thesis is concerned.

Even if a property-right in personal information, or images, is adopted, however, that right needs to be realised in practice through the implementation of one or more legal mechanisms. For example, a property-rights approach could form the basis of requirements that individuals consent to the distribution or display of information about them, or images of them.<sup>92</sup> It might form the basis of a right to require the deletion of personal information or images, or a right to be compensated for the use of that information or image in certain circumstances.<sup>93</sup>

Consideration would need to be given as to how any property-rights approach could be reconciled with existing intellectual property laws and the public interest in allowing the free use and exchange of information. In the case of images, for example, the default

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An Ambiguous Concept Protecting the Human Persona’(1998) 18 (3) *Loyola of Los Angeles Law Review* 511, 517.

<sup>88</sup> Bambauer uses the term ‘intimate media’ to refer to photographs and audio-visual works with four additional characteristics, namely that they contain images of one or more living persons, one of whom is the plaintiff, where the plaintiff can ‘reasonably be identified from the media, or from the combination of the intimate media and the identifying information presented along with it’ and that the media captures ‘intimate information’ which would be defined as ‘sexually explicit conduct involving the plaintiff’ or ‘the plaintiff’s genitals, pubic area, or (if female) exposed nipple or areola’: Derek E Bambauer, ‘Exposed’, (2013–2014) 98 *Minnesota Law Review* 2025, 2057–8.

<sup>89</sup> *Ibid* 2058.

<sup>90</sup> *Ibid* 2059.

<sup>91</sup> *Ibid*.

<sup>92</sup> Samuelson has also suggested that consent to use — or ‘licensing’ of use of personal information — could be situated outside of a property context: Samuelson, above n 80, 1159–63.

<sup>93</sup> For reasons outlined in Part Two of this Chapter, however, this chapter has not considered any legal mechanism which would require an individual to consent to the capture or publication of an image of themselves. The right to require deletion of images, however, has been discussed in the context of the *Privacy Act* and the introduction of a take-down scheme. A right to receive compensation for the use of certain images has been considered in the context of the introduction of a statutory cause of action for serious invasions of privacy, and it was noted in Chapter Three that existing consumer laws and the law of passing off may allow an individual to receive compensation where their personal information, or their image, is used for commercial gain, without consent.

position in Australian law is that the person responsible for capturing the image is the owner of the copyright in it.<sup>94</sup> There are also unresolved complexities where an image contains personal information about more than one person, for example, in a group photograph.

Accordingly, the benefits of a propertisation approach need to be assessed not in abstract, but by evaluating the particular benefits or drawbacks of legal mechanisms that are based on or can be said to implement that approach. A broader question is whether a property-rights model is appropriate in respect of a resource (personal information), which — unlike real property and other forms of intellectual property — is not scarce nor one in respect of which individuals need to be incentivised to create.<sup>95</sup> This is not to say that these tensions and complexities could not be resolved or that a property-rights approach in relation to personal information in general, or images in particular, is not an option that should be considered further. However, the question of whether a property-rights approach is appropriate or desirable in respect of personal information generally, or images in particular, is not within the scope of this thesis, which limits itself to consideration of whether children need greater control of their image in the online environment.

## 2 *Conclusion as to the Efficacy of this Option*

A property-rights approach to personal data offers a number of benefits in terms of forming the basis for a legal response to the problem with which this thesis is concerned. However, the approach in itself is only as effective as the regulatory mechanisms by which it is implemented and the net benefit of such an approach cannot, therefore, be fully evaluated in abstract, but only through an analysis of those mechanisms.

### F *A Take-Down Scheme for Images of Children*

The removal of unwanted images from the internet or from publication in a particular context is one option that could reduce the extent to which children are vulnerable to developmental harm attendant on the unwanted online publication of an image or its subsequent use. The removal of images from online publication is often referred to as ‘take-down’. For the purpose of this chapter, however, the expression ‘take-down’ is given a broader meaning and applies to the removal of an image from online publication as well as its removal from other contexts.

The take-down of images can be achieved by way of a formalised take-down ‘scheme’. However, the take-down of images can also be incidental. In the Australian context, take-down schemes already exist in relation to certain online content. Chapter Three referred to the scheme operated by the e-Safety Commissioner under the *Online Safety Act* in

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<sup>94</sup> Although Bambauer’s suggestion does address this point: see generally, Bambauer, above n 88.

<sup>95</sup> Samuelson, above n 80, 1140.

relation to cyberbullying material targeted at an Australian child. A take-down scheme also exists under schedules 5 and 7 of the *BSA* in relation to material that is ‘prohibited’ or ‘potentially prohibited’ in line with Australian’s National Classification scheme.<sup>96</sup> In addition, courts have the power to order the take-down of material or its withdrawal from publication by a person who is charged with an offence under division 5 of the *Copyright Act 1968* (Cth).

The take-down of certain material can also occur as an incidence of particular laws and regulations. For example, part V, division 2AA of the *Copyright Act 1968* (Cth) sets out a ‘safe-harbour’ scheme, which is designed to limit the remedies available against carriage service providers<sup>97</sup> for infringements of copyright.<sup>98</sup> Reliance on the scheme is subject to a carriage service provider meeting a number of conditions, which depend, in turn, on the category of infringing activity. Some of those conditions require a carriage service provider to take-down or remove access to infringing material upon receipt of notification or upon becoming aware of material that is infringing or of facts and circumstances that ‘make it apparent that material is likely to be infringing’.<sup>99</sup> These safe harbour provisions therefore act as an incentive for carriage service providers to take down certain material when they become aware of the nature of the material in question. In this sense, the take down of material is an incidence of the existence of the safe harbour scheme.

In the absence of legal consequences for the publication or use of content, however, there is little incentive for those publishing or using that content to remove it. In the case of internet intermediaries, for example, Moore and Clayton note that ISPs are ‘reluctant to be drawn into acting as the plaintiff’s agent against their own customers — and at the very least demand recompense for their efforts, along with immunities where errors are made.’<sup>100</sup> For this reason it has been said that incentives are central to the effectiveness of all take-down schemes, being even more important than the nature of the material involved or the legal framework for removal.<sup>101</sup> Nevertheless, intermediaries may be

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<sup>96</sup> The definition of ‘prohibited’ or ‘potentially prohibited’ is tied to the way in which content is or would be classified by the Australian Classification Board under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth); and in line with the National Classification Code (May 2005) F2005L01284.

<sup>97</sup> The definition of ‘carriage service provider’ here is tied to the definition in the *Telecommunications Act 1997* (Cth) s 87: see *Copyright Act 1968* (Cth) s 10.

<sup>98</sup> *Copyright Act 1968* (Cth), s 116AA.

<sup>99</sup> *Ibid* s 116AH. The definition of carriage service provider in the safe-harbour provisions of the *Copyright Act 1968* (Cth) includes internet service providers and telecommunications carriers, but there is uncertainty as to whether the provisions extend to newer digital economy platforms, such as social media providers and user-generated content sites: Department of Broadband, Communications and the Digital Economy, *Australia’s Digital Economy: Future Directions* (2009) 21 [www.dbcde.gov.au](http://www.dbcde.gov.au). Note that there is no ‘immunity’ for copyright infringement provided by *BSA* sch 5, cl 91(1) as that only applies to a rule of common law or equity, or state laws. By way of another example, and as already discussed above, reliance on the safe harbour provisions of *BSA* sch 5, cl 9(1) is dependent upon the content host being unaware of the nature of the content in question: *BSA* sch 5, cl 9(1).

<sup>100</sup> Tyler Moore and Richard Clayton, ‘The Impact of Incentives on Notice and Take-down’ in M Eric Johnson (ed) *Managing Information Risk and the Economics of Security* 199, 199–200.

<sup>101</sup> *Ibid* 200.



incentivised to remove certain content on the basis that it offends their own terms of service, and there may even be ‘public relations’ value in acting expeditiously to remove certain content.<sup>102</sup>

As earlier noted, a number of internet content hosts, such as Facebook and YouTube, make available their own mechanisms for the removal of certain content, where it violates another’s rights or otherwise contravenes the host’s own terms and conditions. For example, and as discussed in Chapter Three, Facebook’s terms state that it has the right to remove material that breaches its terms and standards — this includes images that have been ‘altered to degrade private individuals’ and ‘photos or videos of physical bullying posted to shame the victim’.<sup>103</sup> Some social media providers, including Facebook, make available tools for individuals to report abusive or problematic content.<sup>104</sup> However, as also noted in Chapter Three, while such providers reserve to themselves the right to remove such content, they are generally under no obligation to do so. Given this, and given some of the difficulties that have been expressed by or on behalf of those seeking the removal of content that violates terms or service,<sup>105</sup> the faith that some young people have expressed in the reporting mechanisms available on major social media websites<sup>106</sup> may be misplaced.<sup>107</sup>

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<sup>102</sup> Although in some cases this can backfire — as was the case following Facebook’s decision to remove photographs of breastfeeding women on the basis that nudity went against the site’s community guidelines. That decision has sparked several outcries and required Facebook to issue clarification. See, for example, ‘Facebook Clarifies Breastfeeding Pictures OK, Updates Rules’, *World, CBS News* (Online), 16 March 2015 <http://www.cbc.ca/news/world/facebook-clarifies-breastfeeding-pics-ok-updates-rules-1.2997124>; Emil Protalinski, *Facebook Clarifies Breastfeeding Photo Policy*, ZDNet (7 February 2012) <<http://www.zdnet.com/article/facebook-clarifies-breastfeeding-photo-policy/>>.

<sup>103</sup> Facebook, *Helping to Keep you Safe, Bullying and Harrassment* <<https://www.facebook.com/communitystandards>>.

<sup>104</sup> See, eg, Facebook, *Report Something, How to Report Something* <<https://www.facebook.com/help/181495968648557>>; YouTube, *Reporting and Enforcement Center* <<https://www.youtube.com/yt/policyandsafety/reporting.html>>; Instagram, *Report Something, Privacy & Safety Center*, <<https://help.instagram.com/165828726894770/>>.

<sup>105</sup> See, eg, UNSW Cyberlaw and Policy Community, Submission No 98 to ALRC, *Serious Invasions of Privacy*, Discussion paper, No 98 (2014) 8.

<sup>106</sup> ALRC, *For Your Information*, above n 10, 2234 [67.43].

<sup>107</sup> See, eg, Matthew Keeley et al, *Research on Youth Exposure to, and Management of, Cyberbullying Incidents in Australia: Part B – Cyberbullying Incidents Involving Australian Minors, the Nature of the Incidents and How They Are Currently Being Dealt With* (SPRC Report 10/2014) Sydney: Social Policy Research Centre, UNSW, Australia 48; and See also JSCCS, Parliament of Australia, *High Wire Act: Cyber-Safety and the Young*, Interim report (June 2011) 242. See also the speech made by Senator Bilyk during the second reading debate on the Enhancing Online Safety for Children Bill 2015, where the senator quoted from an email sent by the CEO of Twitter to his Executive Team, in which he wrote: ‘We suck at dealing with abuse and trolls on the platform and we’ve sucked at it for years. It’s no secret and the rest of the world talks about it every day. We lose core user after core user by not addressing simple trolling issues that they face every day. I’m frankly ashamed of how poorly we’ve dealt with this issue during my tenure as CEO. It’s absurd. There’s no excuse for it. I take full responsibility for not being more aggressive on this front’: Commonwealth, *Parliamentary Debates*, Senate, 3 March 2015, 1037 (Catryna Bilyk). See also South Australian Law Reform Institute, above n 10, 49 noting that: ‘The Law Society of South Australia was particularly concerned with the ineffectiveness of industry self-regulation in relation to handling digital

Aside from safe harbour provisions or other ‘public relations’ reasons that incentivise the removal of images from online publication, the incidental take-down of unwanted images is unlikely in Australia. One option, therefore, is to create a formalised take-down scheme that would require certain individuals or organisations to remove images upon receipt of a request to do so, even where the publication of such images would not otherwise be unlawful or prohibited nor attract legal sanction.<sup>108</sup> This is similar to the approach taken under the *Online Safety Act*, which does not create new offences for the hosting of cyberbullying material, but which does impose sanctions on certain social media services for failing to comply with a removal notice. A take-down scheme for images could take various forms. However, the following section of this part of the chapter explains one form that the take-down scheme could take.

### 1 *The Form of a Take-Down Scheme for Images*

The scheme proposed here is one that allows for the issuance of a take-down notice whenever publication or use of an image of a child is against the ‘reasonable interests’ of that child. In order to be as effective as possible, and to ensure that all Australian children are treated consistently, as well as to address jurisdictional issues (discussed further in Part Four below), the scheme should be enacted in Commonwealth legislation. Such a scheme is explained in more detail below and its application to the scenarios in the case studies is then considered.

#### *(a) When is Ongoing Publication or Use of an Image against a Child’s ‘Reasonable Interests’?*

The starting point of a reasonable interests test would be to determine whether the ongoing publication or use of the image is contrary to the ‘best interests’ of the image subject. It will be recalled that Chapter Two advanced and supported two propositions: namely that an image subject who is a child can be harmed by the publication of an image or its subsequent use, (1) even where that publication or use is not ill-intentioned and (2) regardless of whether or not the image can be described, objectively, as harmful. One of the reasons for this is that unwanted publication of an image can act, more or less directly, on an individual’s self-esteem as well as upon their relationships. On that basis, a presumption could operate such that any online publication or use of an image of a child, where that publication or use is unwanted by the child depicted, could be considered contrary to the best interests of the image subject. A best interests test would also allow a regulator to determine whether publication or use of an image was contrary to a child’s

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content complaints’. But see, eg, AIMIA Digital Policy Group, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 7 March 2014, 9 querying whether reporting systems developed by large social media companies are inadequate or whether there is a lack of public knowledge about where to go if there are concerns (although note that membership of this group includes, inter alia, Facebook and Google).

<sup>108</sup> This is on the assumption that publication is not otherwise unlawful or prohibited. The scheme would not provide immunity vis-a-vis content the publication or hosting of which is otherwise unlawful or prohibited.

best interests even when the image subject was not aware of the publication or specific use of the image in question. For example, it will be recalled that in the scenario presented in Case Study Five (Tyger and Lilly), Lilly was not aware of the use of her image to illustrate a newspaper article about obesity. However, on application from an appropriate individual on Lilly's behalf, a regulator could nevertheless decide whether publication of the photograph was in Lilly's best interests or not. Here the wishes of Lilly's parent or parents on her behalf should be taken into account, but other considerations might include the nature of the image, the likelihood of actual harm to Lilly in the future, and the experience and wishes of the other image subjects (in this case, her brother Tyger).

Although a presumption would be made that publication or use of an image, where that is unwanted by the image subject who is a child, is contrary to the child's best interests it is possible that this presumption could be rebutted in an appropriate case. This chapter does not seek to outline all of the conditions that could allow for rebuttal of that presumption but one such condition might be where the publication has been made by or with the consent of a parent on behalf of the child. The question of the extent to which (if any) a parent's wishes should be allowed to prevail over a child's wishes is, however, an extremely difficult one. It is relevant to note, in this regard, that under the *CRC* the best interests of a child in any given case must not be assessed in isolation. Rather, consideration must be given to the other rights under the *CRC* and, as Tobin writes, 'a decision cannot be said to be in a child's best interests where the outcome would be contrary to other rights.'<sup>109</sup> One of the other rights under the *CRC* is the right of the child 'who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'<sup>110</sup> However, as UNICEF points out in its overview of *CRC* rights, although Article 12 gives the child the right to express an opinion and have that opinion taken into account, this does not mean that children have authority over adults.<sup>111</sup> Moreover, Article 12 specifically recognises that 'the level of a child's participation in decisions must be appropriate to the child's level of maturity. Children's ability to form and express their own opinions develops with age and most parents adults will naturally give the views of teenagers greater weight than those of a pre-schooler, whether in family, legal or administrative decisions.'<sup>112</sup> Furthermore, under Article 18 of the *CRC*, there is recognition that parents or legal guardians have the primary responsibility for the upbringing and development of the child.<sup>113</sup> Therefore, where a parent believes that an image should be published or used in a particular context and the child does not agree, a regulator would be required to make an assessment both as to the

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<sup>109</sup> Tobin, above n 31, 591.

<sup>110</sup> *CRC* art 12.

<sup>111</sup> UNICEF, *Fact Sheet: A Summary of the Rights under the Convention on the Rights of the Child*, <[http://www.unicef.org/crc/files/Rights\\_overview.pdf](http://www.unicef.org/crc/files/Rights_overview.pdf)> 2 ('Article 12').

<sup>112</sup> *Ibid.*

<sup>113</sup> *CRC* art 12.

capacity of the child to decide for themselves whether or not the image should be published or used and the appropriateness (or otherwise) of the parent's wishes that it should be.<sup>114</sup>

Even when the on-going publication or use of an image is determined to be contrary to a child's best interests, this would only be a starting point. Although a child's best interests should always be a primary consideration, in line with the best interests principle in the *CRC*, this does not mean that the child's interests should necessarily prevail over other rights and interests, including the public interest in free expression.<sup>115</sup> In its submission to the government's public consultation on Enhancing Online Safety for Children, the Australian Human Rights Commission welcomed the fact that the consultation paper recognised that 'if measures proposed have the potential to impact on freedom of expression, then it is important that they are reasonable and proportionate to the intended policy goal of improving the online safety of Australian children.'<sup>116</sup> To ensure that a take-down scheme in relation to images of children does not constitute an unreasonable and disproportionate limitation on free expression or the interests of other stakeholders (including other image subjects) and other matters of public interest, the best interests of the image subject need to be balanced against any competing interests.

One way of striking a balance between the best interests of a child and other interests could be by providing for exemptions for media organisations that meet certain conditions. As discussed earlier in this thesis, media organisations are exempt from the *Privacy Act* in relation to acts done or practices occurring in the course of journalism, and on condition that the media organisation is publically committed to observe certain standards.<sup>117</sup> In the context of a take-down scheme for images of children, the application of a similar exemption would go some way to protecting the public interest in freedom of the media. In context of the case studies in Chapter Four, such an exemption would mean that Tyger and Lilly (Case Study Five) might not be able to request the removal of their image from the news story on obesity (unless the media organisation that published the story was not publically committed to relevant standards). Likewise, Ben (Case Study Six)

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<sup>114</sup> Here it is interesting to note that the Broadcasting Standards in New Zealand Codebook provides that a broadcast is not a breach of the privacy of a child under 16 where consent has been given by a parent or guardian and the broadcaster is satisfied that the broadcast is not contrary to the child's best interests: Broadcasting Standards Authority, *Broadcasting Standards in New Zealand Codebook: For Radio, Free-to-Air Television & Pay Television*, April 2016, 31 [Standard 10g].

<sup>115</sup> Which, it will be recalled from Chapter Five (Part Three, Section Six), is also a right that inheres to children under the *CRC*.

<sup>116</sup> Australian Human Rights Commission, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 5 March 2014, 5.

<sup>117</sup> *Privacy Act* s 7B(4).

would be unable to request the removal of his image from a news website — but could possibly succeed in having the image removed from his friends’ social media pages.<sup>118</sup>

On the other hand, as noted in the Report of the Independent Inquiry into the Media and Media Regulation<sup>119</sup> (‘the Finkelstein Review’), ‘the news media can cause wrongful harm to individuals and organisations by unreliable or inaccurate reporting, breach of privacy, and the failure to properly take into account the defenceless in the community.’<sup>120</sup> The Finkelstein Review also noted that the current systems of self-regulation of the press and co-regulation of broadcast media have not worked satisfactorily.<sup>121</sup> This is one reason why the Finkelstein Review recommended a system of ‘enforced self-regulation’ whereby an independent statutory body, the News Media Council, would oversee the enforcement of standards of news media.<sup>122</sup> Were the recommendations of the Finkelstein Review to come into effect,<sup>123</sup> images published by news media over which the News Media Council has jurisdiction could be exempt from the take-down scheme. If a system of enforced self-regulation is not enacted, however, there is an argument that the take-down scheme should apply to images published by news media.

Aside from the public interest in a free media, however, other matters of public interest would also need to be balanced against an image’s subject’s best interests. In its report *Serious Invasions of Privacy*, the ALRC lists a number of public interest matters that should be specifically taken into consideration by a court in striking a balance between an individual’s privacy interests and other countervailing interests, although the list is not intended to be exhaustive.<sup>124</sup> That list includes freedom of expression, ‘particularly political communication and artistic expression’ and ‘freedom of the media, particularly to responsibly investigate and report matters of public concern and importance.’<sup>125</sup>

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<sup>118</sup> Although this would depend on whether the exemption applied only to media organisations acting in the course of journalism, or whether it applied to images used initially in the context of journalism but later re-published.

<sup>119</sup> The Hon R Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation*, Report for Department of Broadband, Communications and the Digital Economy, 28 February 2012.

<sup>120</sup> Ibid 282 [11.10].

<sup>121</sup> Ibid 283 [11.16].

<sup>122</sup> Ibid 290 [11.44].

<sup>123</sup> Which must be considered unlikely: see, eg, Jonathan Holmes, ‘Media Regulation in the Brave New Digital World’ *The Drum*, ABC (online) 14 March 2013 <<http://www.abc.net.au/news/2013-03-14/holmes-media-regulation-in-the-brave-new-digital-world/4571090>>. See also Australian Government; *Convergence Review – Final Report*, Report for Department of Broadband, Communications and the Digital Economy, March 2012, xiii-xiv commenting that the establishment of a publically funded statutory authority as proposed by the *Report of the Independent Inquiry into the Media and Media Regulation* is considered to be a ‘position of last resort’. See also ‘Press Has Condemned Finkelstein’s News Media Council but Would It Be Worse for Radio Than ACMA?’, *RadioInfo*, News, 5 March 2012 <<https://www.radioinfo.com.au/news/press-has-condemned-finkelsteins-news-media-council-would-it-be-worse-radio-acma>> reporting comments by Malcolm Turnbull (then Shadow Communications Minister) such that ‘[Finkelstein’s key recommendations] are not [ones] which would appeal to the Coalition, believing as we do in a free press – free in particular to hold governments to account.’

<sup>124</sup> ALRC, *Serious Invasions of Privacy in the Digital Era*, above n 10, 150 [9.36].

<sup>125</sup> Ibid [Recommendation 9-2].

Similarly, a non-exhaustive list of public interest matters that should be considered by a regulator in striking the balance between a child's best interests and countervailing interests could be included in the statute implementing a take-down scheme for images in order to provide guidance.<sup>126</sup>

In some cases striking the balance between the best interests of the image subject and any countervailing interests will be straightforward. For example, in relation to Case Study One (Jackie) there are clearly no public interest reasons that justify overriding Jackie's best interests— not least because the publication of Jackie's photograph is, in any event, illegal and would constitute a breach of Jackie's civil rights. In other cases, striking a balance between competing interests would necessarily be more complex and would likely involve an intense focus on the facts of the case at hand. It may involve placing countervailing interests on a spectrum, much as the European Data Protection Working Party ('Working Party') has suggested be done when determining, for the purpose of the right of erasure in the proposed European Data Protection Directive, whether a data controller has legitimate and compelling grounds sufficient to override the interests of a data subject in the protection of their personal information.<sup>127</sup> That is, the Working Party has suggested that the interests of a data controller (and presumably those of any third party upon whom a data controller is relying for the processing of data) could range from 'insignificant to somewhat important, to compelling'.<sup>128</sup> Alternatively, the approach adopted by the Court of Appeal of England and Wales in the recent case of *Weller*, the facts of which have been set out previously, might be followed. Here the court, having determined that the children who were subjects of an image had their rights to a private life under Article 8 of *ECHR*<sup>129</sup> engaged in relation to the capture and publication of an image of them, went on

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<sup>126</sup> Groothuis has suggested that when balancing the interest in personal integrity and privacy of a child against the interest in protecting the freedom of expression, the European Court of Human Rights could consider the degree of dissemination of the information: Marga M Groothuis, 'The Right to Privacy for Children on the Internet: New Developments in the Case Law of the European Court of Human Rights' Simone van der Hof, Bibi van den Berg and Bart Schermer (eds) *Minding Minors Wandering the Web: Regulating Online Child Safety* (Springer, 2014 (24)) 143, 154. Similarly, the degree to which an image has been disseminated or accessed is one consideration that could be considered by a regulator determining whether to issue a take-down notice in respect of a particular image.

<sup>127</sup> Article 29 Data Protection Working Party, Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC, 844/14/EN, Adopted 9 April 2014, 30.

<sup>128</sup> Likewise, the interests of a data subject could be more or less significant and 'may range from trivial to very serious': *ibid* 30. Relevantly for the present discussion, the Working Party offers the following view in relation to an assessment of the impact of the processing of personal data on a data subject: 'In addition to adverse outcomes that can be specifically foreseen, broader emotional impacts also need to be taken into account, such as the irritation, fear and distress that may result from a data subject losing control over personal information, or realising that it has been or may be misused or compromised, — for example through exposure on the internet. The chilling effect on protected behaviour, such as freedom of research or free speech, that may result from continuous monitoring/tracking, must also be given due consideration': *ibid* 37.

<sup>129</sup> *ECHR* art 8.

to consider how those rights should be balanced against the countervailing right to freedom of expression in Article 10 of the *ECHR*. The court noted, in this regard, that:

although a child's right is not a trump card in the balancing exercise, the primacy of the best interests of a child mean that, where a child's interests would be adversely affected, they must be given considerable weight. It might require very powerful article 10 rights (for example, exceptional reasons in the public interest) to outweigh a child's article 8 rights where publication would be harmful to the child.<sup>130</sup>

The court also went on to cite with approval the judgment of Ward LJ in *K v News Group Newspapers Ltd*,<sup>131</sup> a section of which also seeks to place a particular value on different forms of expression in the context of balancing one person's Article 8 rights with another's Article 10 rights:

Here there is no political edge to the publication. The organisation of the economic, social and political life of the country, so crucial to democracy, is not enhanced by publication. The intellectual, artistic or personal development of members of society is not stunted by ignorance of the sexual frolics of figures known to the public. As Lord Hope said of Miss Campbell (paragraph 120 of *Campbell v MGN Ltd*), 'it is not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy.'<sup>132</sup>

That some types of expression should be regarded as more 'deserving of protection' than others was also recognised by Baroness Hale in *Campbell*, who observed that political speech was 'top of the list'.<sup>133</sup> It will be recalled that the ALRC's list of public interest matters (although not exhaustive) refers specifically to free expression, especially political and artistic expression; however, commercial expression is not specifically mentioned. Therefore, in determining where to strike a balance between the best interests of a child who is an image subject and any countervailing interests, it is arguable that commercial expression should rarely be considered an exceptional reason in the public interest to justify overriding the child's best interest. Moreover, there is some precedent for regarding commercial expression as of 'lower value' than other forms of expression.<sup>134</sup> On

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<sup>130</sup> *Weller* [2015] EWCA Civ 1176 [40] (Lord Dyson MR).

<sup>131</sup> [2011] EWCA Civ 439.

<sup>132</sup> *Weller* [2015] EWCA Civ 1176 [21] (Lord Dyson MR).

<sup>133</sup> *Campbell* [2004] 2 All ER 995, 1036 [148].

<sup>134</sup> In the US some proponents of the 'commercial speech doctrine' argue for extension of what was otherwise a 'limited, intermediate level of protection for commercial speech' Tamara R Piety, 'Against Freedom of Commercial Expression' (2007–2008) 29 *Cardozo Law Review* 2583, 2585. Piety notes, however, that the commercial speech doctrine is of 'relatively recent vintage' and, in arguing against expansion of the doctrine writes that: 'To attempt to shield what would otherwise be a fraudulent statement by dressing it up as protected expressive speech is really an attempt to conflate categories of speech in order to deflect legitimate regulation': at 2585, 2675. Discussions about the extent to which commercial expression has value, the freedom of which should be protected, come to the fore in litigation involving the promotion of tobacco products. In this context Reid has written that: 'Case law clearly shows that while the Court considers that commercial expression does have intrinsic value, this value is not the same, or as great, as the value intrinsic to non-commercial expression': Caroline Reid, 'Freedom of Expression, Commercial

this basis, it could be concluded that where images are used for commercial purposes the image subject's reasonable interests in removing the image should prevail. Thus, in the context of Case Study Three, Alison Chang's reasonable interests would favour the removal of the photograph from Virgin's advertising campaign.<sup>135</sup> If the photograph of the schoolboy rowers (Case Study Seven) is used in a commercial context (for example, if the voyeuristic website is accessible only to paying viewers) then, again, that commercial expression would not justify overriding the best interests of the boys.

Where an image is not used for commercial purposes and where the publication or use of the image is not otherwise illegal or contrary to an image subject's civil or equitable rights, it is likely to be more difficult to establish whether the public interest in permitting ongoing publication and use outweighs the image subject's best interests. In such cases the approach of the Supreme Court of Canada in *Aubry*<sup>136</sup> is informative. The case was an appeal by Les Éditions Vice-Versa Inc, the publishers of an arts magazine that had published a photograph of the respondent sitting on a steps in front of a building in Montreal. The photograph was taken in a public place and without the consent of the respondent. At the time the photograph was taken the respondent was 17 years old.<sup>137</sup> The majority of the Supreme Court held that the right to one's image was an element of the right to privacy under the Quebec *Charter of Human Rights and Freedoms*, a right that, in this case, conflicted with another right guaranteed under the Charter, namely the right to freedom of expression. The majority of the Supreme Court held that the

artistic expression of the photograph, which was alleged to have served to illustrate contemporary urban life, cannot justify the infringement of the right to privacy it entails. It has not been shown that the public's interest in seeing this photograph is predominant.<sup>138</sup>

Referring to the balancing exercise that needs to be undertaken whenever a person's right to privacy is in conflict with other rights, the majority expressed their view that 'the balancing of the rights in question depends both on the nature of the information and on

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Expression and Tobacco in Canada' (2008) 39 *Victoria University of Wellington Law Review* 343, 363. In *Canada (Attorney-General) v JTI-MacDonald Corp* [2007] 2 SCR 610 [47] the Supreme Court of Canada noted that 'When commercial expression is used, as alleged here, for the purposes of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.' It will be recalled from Chapter Four that in the context of *Google* (Court of Justice of the European Communities, C-131/1213 May 2014) [81], the European Court of Justice regarded Google's interests in processing personal information for the purposes of its search engine as 'merely economic' and, as such, insufficient to justify an interference with a data subject's personal information — the court did not specifically the question as to whether these economic interests would count as a form of 'commercial expression' cf *Google*, Case C-131/12, Opinion of AG Jääskinen [120], [122], [132].

<sup>135</sup> A different (and anterior) question in respect of that scenario, however, is whether the take-down scheme should apply to images used in an offline context: that question is explored further below [Cross REF].

<sup>136</sup> *Aubry* [1998] 1 SCR 591.

<sup>137</sup> *Ibid* [40] (L'Heureux-Dubé, Bastarache, Gonthier, Cory and Iacobucci JJ).

<sup>138</sup> *Ibid* [62].



the situation of those concerned. This is a question that depends on the context.<sup>139</sup> Similarly, Lamer CJ stated that ‘the content of the concept of public interest depends on the nature of the information conveyed by the image and on the situation of the parties involved.’<sup>140</sup>

This approach contains a clue as to how the balancing exercise in the context of a take-down scheme for unwanted images of children could be approached; that is, regard must be had to the nature of the image and the situation as a whole. On this basis, where the image in question is clearly harmful (in the sense of likely to cause psychological harm or place the image subject in danger), or is (when considered objectively) embarrassing or humiliating or where it depicts nudity or partial nudity, the public interest will be more readily struck in favour of the child’s interests. However, the situation of the parties will also be relevant, as will the context as a whole. Where there is more than one image subject, the interests of the other image subjects need to be factored in, and where the photographer is a child, those interests may result in the balance being struck in favour of the photographer. Consent should also be a relevant factor, as should the forum of publication — for example, whether the photograph was made available to a limited audience, and whether the image formed part of news coverage — and whether or not the child appears only incidentally in the image rather than being its intended subject. When factoring in these other interests, however, it needs to be remembered that one purpose of a take-down scheme is to protect the freedom of expression of an image subject who is a child.<sup>141</sup> In other words, a regulator needs to take into account the right to freedom of expression of the complainant (his or her right to choose whether and, if so, how to present themselves), on the one hand, and the freedom of expression of any other image subjects and the photographer and/or publisher, on the other. .

Applying that content and context test, it is possible to reach a view that Tim (Case Study Two) should succeed in getting the image removed because it depicts partial nudity and, judged objectively, might be considered embarrassing. Although the photographer was also a child (who’s best interests need to be considered), the image is published on a publically accessible Facebook page and without Tim’s consent. In addition, Tim’s interests in freedom of expression should also be factored into the equation — if Tim has no ability to secure removal of this image he may become more self-conscious about how he appears, even before his friends.

In relation to Case Study Four (Shabeeha), the fact that the image had been manipulated to present Shabeeha in a false light suggests that the balance should be struck in Shabeeha’s favour. The photograph has been taken by another young person (whose best interests need to be considered), and might be considered an example of artistic

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<sup>139</sup> Ibid [58] (L’Heureux-Dubé, Bastarache, Gonthier, Cory and Iacobucci JJ).

<sup>140</sup> Ibid [26] (Lamer CJ).

<sup>141</sup> Refer to the discussion in Chapter Five, Part Three, Section Six.

expression. However, taking account of the situation as a whole, the potential impact of the photograph on Shabeeha's standing among family and friends may be another reason to strike the balance in Shabeeha's favour. The photograph also depicts another young person, Matt, whose interests would also need to be taken into account. However, there is nothing in the facts of the case study to suggest that Matt would object to the image being removed.

In terms of Case Study Five (Tyger and Lilly), the photograph has been used to illustrate a story about obesity on a news website. Although importance should be attached to freedom of the media, the use of that particular photograph to illustrate the news story is not a matter of public concern and importance. This is particularly the case because the story about obesity does not relate to the children themselves — it has been chosen merely as an illustration. Moreover, no attempt was made to obscure the identity of the children, which, arguably, could easily have been done without compromising the overall 'impact' of the image. The photograph was not used with the consent of the children nor, so far as is able to be ascertained, the consent of the children's mother.<sup>142</sup> In terms of the content of the image, it depicts partial nudity and could, objectively, be described as embarrassing. The fact that Tyger's friends have seen the photograph and teased him about being a 'junk food addict' (the photograph having been illustrated with the caption 'Even very young children are addicted to junk food') suggests that there is real harm connected to the use of the photograph to illustrate the news story. In *Weller*, the Court of Appeal referred, with approval, to a section of the judgment in the case of *K* in which Ward LJ 'concluded (without evidence) that the children in that case were "bound to be harmed" because the invasion of privacy "would undermine the family as a whole and because the playground is a cruel place"'.<sup>143</sup> Therefore, unless a take-down scheme included carve-outs for the media (as discussed above) a reasonable interests test would likely result in the image being removed.

In relation to Case Study Six (Ben), the airing of footage depicting Ben in the aftermath of a car accident would be regarded as an incidence of freedom of the media, and involves reporting on a matter of public concern. Unlike the situation involving Tyger and Lilly (Case Study Five), the footage is directly relevant to the story and not merely illustrative. In terms of the content, there is nothing necessarily embarrassing (judged objectively) about the content, although it is no doubt distressing for Ben to view it. There is a question as to whether the reporting itself is sufficiently sensitive. Although it is not clear from the case study whether the media organisation that aired the footage is committed to apply the same editorial standards to its online footage as to footage that is broadcast on TV,

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<sup>142</sup> If the photograph had been used with the permission of the mother, it is possible that the court would find that the use of the photograph was in fact not contrary to the child's best interests — this is because art 5 of the *CRC* provides that 'States Parties shall respect the responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention'.

<sup>143</sup> *Weller* [2015] EWCA Civ 1176 [41] (Lord Dyson MR).

being a commercial broadcaster the content of footage aired by the station will be governed by standards in the Commercial Television Code of Practice. As already noted in Chapter Four, that code provides that licensees must ‘exercise special care before using material relating to a child’s personal or private affairs in the broadcast of a report of a sensitive matter concerning the child’.<sup>144</sup> The code also provides that licensees must ‘exercise sensitivity in broadcasting images of or interviews with bereaved relatives and survivors or witnesses or traumatic incidents.’<sup>145</sup> If the footage itself contravenes the code this could therefore be a reason for striking the balance in favour of Ben’s interests and removing the footage (assuming, of course, that the scheme does not include carve outs for the media). However, this is certainly not clear-cut. Reasons that count against the take-down of the content include the fact that the footage depicts several other children who, it is said, are not concerned about appearing in the footage — although this is not to say they would object to it being taken-down. Considering the interests of the other image subjects who are children would, however, be crucial in making a determination as to where the balance should be struck. One possible way to factor in the interests of the other image subjects could be by requiring that the footage of Ben’s face is pixelated. The anonymisation or de-identification of personal information was discussed in Section C above. Although it was concluded that the inclusion of such requirements in the *Privacy Act* would be of limited efficacy, the use of such mechanisms as an alternative to the take-down of an image could achieve a balance between competing interests. That said, given that Ben would still be recognisable to many from the context of the footage, it is possible that pixilation would do little to relieve Ben’s distress.

Case Study Seven (Schoolboy Rowers) involves an image that is not offensive or objectionable but which has been used in the context of a voyeuristic website. If the website is operated for commercial gain there is an argument — already advanced above — that this will not constitute sufficient public interest to override the best interests of the rowers in having the image removed. Even so, it is unlikely that there is any ‘exceptional public interest’ to override the boys’ best interests. The lack of consent to the use and the context of publication, coupled with the real potential for distress on the part of the image subjects and the fact that it sexualises the boys, would be sufficient to strike the balance in favour of taking-down the image. Of course, the fact that the image is published offshore may make it difficult in practice for such take-down notices to be enforced — but this is a separate issue addressed later in this section. In addition, there is the possibility (discussed earlier in this thesis) that the content of the image could, given the context in which it has been published, constitute prohibited content according to the criteria in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), the National Classification Code and the Guidelines for the Classification of Films and

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<sup>144</sup> Commercial Television Industry Code of Practice 2015, cl 3.5.2.

<sup>145</sup> Ibid cl 3.2.1(d).

Computer Games 2005.<sup>146</sup> If so, this would be another reason to strike the balance in favour of the withdrawal of the image from publication.

Finally, in relation to Case Study Eight (Harry) there is nothing about the content of the image (Harry standing at the bus stop) that could be considered (judged objectively) harmful or embarrassing. Although Harry has not consented to the capture and use of his image, there is public interest in free expression, which would include the interest of the photographer (also a child) in taking and publishing the photograph. In this case, then, although the on-going publication of the photograph can be considered contrary to Harry's best interests, the balance would probably come down in favour of the best interests of the photographer and the public interest in freedom of expression.

The illustrations above have shown that a take-down scheme based on a 'reasonable interests' test would allow for the take-down of images in a range of situations, but would not be automatic. In order to determine the reasonable interests of the image subject, various criteria could be taken into account, as outlined above. It is not proposed, however, that the above criteria are exhaustive. Indeed, the regulator charged with overseeing the take-down could be given broad discretion to take into account any relevant consideration in determining whether a particular image should be taken down.

#### *(b) Would a Take-Down Scheme Apply to Offline Images?*

A take-down scheme could be limited to the removal of online images, or could also apply to images published in more traditional media such as in print versions of newspapers and magazines, on television, in books and on billboard advertisements. Broadening the scheme in this way would, however, raise a number of issues. One issue is that the removal of images that have been published in traditional media will often be impractical or even impossible, such as where books and newspapers have already been distributed and are no longer under a publisher's control. However, this issue could be resolved by requiring a publisher or content host to delete images only in circumstances where they maintain sufficient control over the place in which the image in question is published.<sup>147</sup> Another issue is that deletion of images from print media, even where practical, would likely entail greater costs for the publisher. For example, if Virgin Mobile were required to remove the image of Alison Chang from its billboard advertisements, there would be costs associated with this — not only the physical costs of removing material but the cost of replacing the advertisements with something else. These costs are not peculiar to the removal of images from print, but given the nature of the print medium, are likely to be greater than the costs incurred in removing and replacing images in a digital medium. Arguably, however, these costs can be avoided altogether if organisations ensure they

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<sup>146</sup> See Chapter Four (Case Study Seven).

<sup>147</sup> Of course there is the question as to what would constitute 'sufficient control'. Any definition would need to take account of contractual arrangements applicable to the publication of the image, among other things.

have an image subject's consent to the use of their image (on the assumption, of course, that the provision of consent would preclude an image subject from subsequently calling for the removal of an image — as discussed above ).

Another issue with extending a take-down scheme to images published or used in 'offline' media, is that many of these other forums are already regulated in other ways. Content broadcast on TV and radio is subject to co-regulation, whereby most aspects of program content are covered by industry codes developed in consultation with ACMA.<sup>148</sup> ACMA also has a role in handling complaints and, where warranted, imposing sanctions on broadcasters.<sup>149</sup> By contrast, print media is largely self-regulated,<sup>150</sup> as is the content of advertisements.<sup>151</sup> Regulation of content in books, films and computer games is subject to direct regulation by government.<sup>152</sup> Extending a take-down to all these forums would entail complexity and raise numerous issues in terms of the interaction between the existing forms of regulation and the take-down scheme.

On the other hand, the current environment is one of media convergence<sup>153</sup> and it is arguably unrealistic to restrict a take-down scheme to content based purely on the forum in which material is published. The ALRC, for example, has noted that media convergence has had a 'transformational impact on media and communications industries' in response to which 'radical changes to the policy framework' are required.<sup>154</sup> In response to the transformations brought about by media convergence, a number of submissions to the ALRC Classification — Content Regulation and Convergent Media inquiry highlighted the necessity of a more 'platform-neutral approach to media content regulation and classification'.<sup>155</sup> Ultimately, this chapter recognises that there are important questions as to whether a take-down scheme should be limited to online content or should apply more generally, and as to whether there should be exemptions related to the type of forum on which content is hosted. This thesis does not seek to resolve those questions, as the focus has been on the harms attendant on online publication of images. However, it is recommended that further research be conducted into the effects of the use of images of children in whatever medium they are published, which could inform the resolution of these questions.

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<sup>148</sup> ALRC, *Classification – Content Regulation and Convergent Media*, Report No 118, February 2012, 305 [13.14].

<sup>149</sup> Finkelstein, above n 119, 169–72.

<sup>150</sup> Ibid 189.

<sup>151</sup> ALRC, *Classification*, above n 148, 304 [13.17].

<sup>152</sup> Ibid, 305 [13.15].

<sup>153</sup> ACMA has defined media convergence as 'the phenomenon where digitisation of content, as well as standards and technologies for the carriage and display of digital content, are blurring the traditional distinctions between broadcasting and other media across all elements of the supply chain, for content generation, aggregation, distribution and audiences': ACMA, *Digital Australians—Expectations About Media Content in a Converging Media Environment: Qualitative and Quantitative Research Report* (2011), 7.

<sup>154</sup> ALRC, *Classification*, above n 148, 65 [3.11].

<sup>155</sup> Ibid 66 [3.12].

*(c) Who Would a Take-Down Scheme Apply to?*

A take-down scheme in respect of images could be more or less limited. It could, for example, only apply to individuals who are directly responsible for the posting of images: in the context of the regime established under the *Online Safety Act* these individuals are referred to as end-users. However, given what has been said about the speed and extent of dissemination in the online environment in particular, limiting the scheme to end-users would be of limited efficacy. Moreover, it is not always possible for an image subject to easily identify who is responsible for initial publication. In order to be effective, then, the scheme would require the removal of material by internet content hosts. In the online environment, the scheme could be limited to social media providers, as is the case with respect to the take-down regime established under the *Online Safety Act*. There are advantages in limiting a scheme to *participating* internet content hosts. As discussed in the section on ‘enforcement and implementation’ in Part Four below, having a participatory scheme overcomes jurisdictional obstacles in relation to the removal of online content. It is also likely to reduce the costs incurred by the government in enforcing such a scheme. Nevertheless, it is difficult to see why a take-down scheme should be limited to social media services, in the same way that the scheme established under the *Online Safety Act* is. Although it is true that social media services represent a prevalent means of communication between children, this thesis has argued that the unwanted online publication of images of children or their subsequent use where that is also unwanted exposes children to the risk of harm regardless of the forum of communication. There is no reason in principle to exclude from a take-down scheme images used to illustrate websites and blogs that are not considered social media services.<sup>156</sup>

As to whether the scheme should be extended to material published offline, this has already been discussed above.

*(d) Would Requests be Mediated by a Court or a Regulator?*

A take-down scheme in relation to images of children, based on a ‘reasonable interests test’, could require take-down requests to be addressed to the end-user and any others responsible for publication directly. In the event that the publisher or host refused to comply with the request, the person making the request could take legal action through the courts, or could complain to a statutory officer or ombudsman who would then be empowered to investigate. Alternatively, a scheme could require such requests to be addressed, in the first instance, to a court or other regulator.

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<sup>156</sup> Under the *Online Safety Act* a social media service is defined in s 9 as a service that is not exempt (under s 9(4) or (5)) and that is either specified in the legislative rules as a social media service or that meets several conditions (in addition to any conditions that may be specified in legislative rules), as follows: ‘(i) the sole or primary purpose of the service is to enable online social interaction between 2 or more end-users; (ii) the service allows end-users to link to, or interact with, some or all of the other end-users; (iii) the service allows end-users to post material on the service’.

As to whether end-users (where readily identifiable) should be approached directly by an image subject before complaint is made, there are arguments for and against this. It is possible that addressing take-down requests directly to end-users would result in the successful removal of an image without necessitating any involvement by regulators. However, some young people may be reluctant to approach the end-user in the first instance.<sup>157</sup> Therefore, it is suggested that if a young person has not requested the end-user to remove the image in the first instance, they be required to state their reasons for this when applying to the regulator.

It will be recalled that the scheme established by the *Online Safety Act* requires requests to be addressed to social media service providers, who then have a short period of time to take-down the material before a complaint is addressed to the e-Safety Commissioner. One advantage of this approach is that in those cases where the social media service agrees to remove the content, it omits entirely the time, expense and inconvenience of the involvement of a regulator. However, one difference between that scheme and a broader take-down scheme for images proposed here is that the former scheme applies to cyberbullying material, the posting of which is likely contrary to the terms of service of the applicable internet content hosts, and often considered to contravene social norms. There is therefore some ‘intrinsic motivation’ for those content hosts to remove the content themselves. In the case of a broader take-down scheme for images of children, the posting of many images will not be contrary to the terms and conditions of the content hosts (who in fact want to encourage users to post images of others). Neither is the posting of images of others necessarily contrary to social norms. Accordingly, internet content hosts are unlikely to ‘voluntarily’ remove such material, absent direction from a regulator, and would likely regard the non-mandated removal of such images as highly unpopular with end-users.

A scheme that required application to be made to a court of law in the first instance would be a significant barrier to young people for reasons already discussed above, and would render the scheme largely ineffective. It would also represent a significant burden for the taxpayer. It is suggested, therefore, that a regulator, rather than the courts, should play a mediating role in deciding whether images should be taken-down, based on the ‘reasonable interest’ test. This would undoubtedly raise concerns that a regulator is not as qualified as the courts to make a determination between the best interests of image subject and countervailing public interests. However, detailed guidance for a regulator could be developed within the statute implementing the take-down scheme.

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<sup>157</sup> For example, during a High School Forum conducted as part of research for the JSCCS report into Cyber-Safety, ‘an extremely low percentage’ of students indicated that approaching friends to request them to remove unwanted images was a successful strategy: JSCCS, above n 107, 241, [7.129]. See also

*In other words, freedom of expression should be entered on both sides of the equation* et al, above n 107, 46 - 47.

## 2 Key Benefits

A scheme that provided children with a mechanism to facilitate the remove of online images, or the removal of a particular image from publication, would give children greater control over the online publication of their image, or its use in a particular context, than they currently enjoy. As illustrated in the previous section, a reasonable interests test could operate in favour of all of the image subjects in the case studies set out in Chapter Four, with the exception of Case Study Eight (Harry). Nevertheless, this part of the chapter only considers a take-down scheme applicable to *online* content, which would rule out its availability to Alison (Case Study Three). Should the scheme be extended to offline content, Alison is likely to satisfy the reasonable interests test — for reasons previously outlined.

The nature of a take-down scheme is such that it operates only after the event of publication. Therefore, it is ineffective as a way of *preventing* unwanted publication and is also unlikely to have the same deterrent effect as a civil remedy vis-a-vis unauthorised publication; this is because there would generally be no ‘penalties’ for or recompense payable by the person responsible for publishing the image — unless that person refused to comply with a take-down request. For this reason, the option is also less likely to influence social norms around the publishing of images of children.

A take-down scheme that was supported by a regulator complaints mechanism would overcome some of the access to justice issues that arise when a person is required to take formal legal action. Nevertheless, it would be important to ensure that the availability of such a scheme was sufficiently socialised among the scheme’s most important stakeholders: namely, children and young people.<sup>158</sup> It is also important to be clear about the complaints process and whether others should be entitled to complain on behalf of a child. The *Online Safety Act* does permit complaints and take-down requests to be addressed to the e-Safety Commissioner by a person on behalf of a child.<sup>159</sup> Without expressing a final view on that issue, it is suggested here that there would be facility for take-down requests to be issued on behalf of an image subject who is a child. In that case, consideration would then need to be directed to the question of whether removal of the image is in the best interests of the image subject on whose behalf the request is being made.

Practical considerations relating to the enforcement and implementation of a take-down scheme are discussed further below. In addition, consideration would need to be given to how an image subject would be able to establish to a regulator and any internet content host that it is they who are depicted in any given image — this might be difficult if an image has been doctored to make the image subject appear differently to the way they

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<sup>158</sup> Commonwealth of Australia, *Access to Justice Arrangements*, above n 7, 326 [9.4].

<sup>159</sup> *Online Safety Act* s 18(2) — although where the person making the complaint is not the parent or guardian of the child, the child must have authorised that person to make a complaint on their behalf.



appear in reality. For example, although an individual might be able to recognise themselves in an image even when it is shot from a distance, the likelihood of others recognising the image subject may be lower. Some guidance can be obtained here from the way in which images are determined to be ‘personal information’ (or not) for the purposes of the *Privacy Act* but further consideration would need to be given to such issues.

Another practical issue relates to the fact that images, even once removed from publication, can always be re-posted. If this occurs the image subject would then have to repeat the process of issuing a take-down notice and could, potentially, be trapped in an endless cycle of issuing take-down requests. The ability to issue an end-user notice, requiring an end-user to remove a particular image and refrain from reposting that image or similar images, would go some way to mitigating this problem, particularly if it was backed up with consequences for a failure to comply.<sup>160</sup> However, it is not always possible for an image subject to identify who is responsible for posting an image. It is possible, also, that a ‘code’ solution might be found to this problem, such as that discussed in relation to the problem of individuals posting and re-posting images removed from publication pursuant to the *Privacy Act*.

A take-down scheme that facilitated the removal of unwanted images, subject to a reasonable interests test, would certainly impact upon other rights and freedoms, particularly freedom of expression and the rights of copyright owners in respect of images in which they own copyright. However, given that the test requires the image subject’s interests to be balanced with countervailing interests, including the public interest in free expression, these interests would be taken into account. That said, if it is for end-users or internet content hosts to decide whether to take-down images upon request in the first instance, there is an argument that the public interest and countervailing interests would be in danger of being overlooked. That is, internet content hosts may be disposed to remove content upon receipt of a request rather than incur the time and costs necessary to make a determination between the image subject’s interests and countervailing interests.

The impact of a take-down scheme on the rights and interests of others is also necessarily limited, by its nature. Firstly, it is limited to images, rather than to information generally. Secondly, it is limited to images that depict a child (or children) and only applies where that child (or children) does not want the image to be published or used in a particular way (or where it is otherwise established that publication is contrary to a child’s best interest). A scheme that did not in itself impose liability in respect of the publication of

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<sup>160</sup> As is the case under the *Online Safety Act* s 48, which provides that non-compliance with an end-user notice can result in an injunction.

images would be unlikely to have a chilling effect on expression, as it would not deter the capture or publication of images.

### *3 Conclusion as to the Efficacy of this Option*

A take-down scheme has certain limitations, such as the fact that it would not be effective to prevent or deter the unwanted publication of images, and would need to be designed in such a way that it enabled the reasonable interests of an image subject to be determined. Such a scheme would also need to address a number of practical considerations. Nevertheless, a take-down scheme could significantly reduce children's vulnerability to harm arising from unwanted on-going publication. A take-down scheme specifically and directly addresses the problem with which this thesis is concerned — that is, it provides for the take-down of unwanted images and does so by assessing whether the image subject has a reasonable interest in removal of the image, rather than focusing on the motives or behaviour of a third party in taking or publishing the image. While it has been argued that the take-down of an image should not depend entirely upon an image subject's wishes, the scheme nevertheless allows for consideration of those wishes and recognises that an image subject may (legitimately) object to the publication of an image even though, objectively speaking, the image may be considered benign. Such a scheme also recognises that image subjects may suffer harm even where the image in question is considered 'benign'<sup>161</sup> and that ongoing harm can occur as a result of the continued publication of an image, beyond any harm that may be suffered on initial publication.

### *G Summary of this Part*

This part of the chapter evaluated a number of possible law reform options in overview and considered the net benefit of each. With the exception of a take-down scheme in relation to images of children, none of the options discussed is designed to specifically address the problem with which this thesis is concerned, and none of them is limited to children. Although each of the options would give children greater control over the online publication or their image or its subsequent use than they currently enjoy, the only option that offers any sort of effective solution to the particular problem with which this thesis is concerned is the introduction of a take-down scheme, albeit one that is subject to a reasonable interests test. The following part of this chapter therefore analyses in more detail the costs and benefits associated with the introduction of such a scheme.

## **IV MORE DETAILED ANALYSIS OF A TAKE-DOWN SCHEME**

The first section of this part considers the extent to which there is public mandate for a take-down scheme for images of children, as outlined in Part Three, Section F of this chapter. This part then analyses some of the costs related to the introduction of a take-down scheme for images of children: specifically fiscal costs and enforcement and

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<sup>161</sup> Although that is not to say, of course, that every benign image will be taken-down.

implementation difficulties. A full costs/benefit analysis is, of course, beyond the scope of this thesis, not least because it would need to include economic analysis of likely costs to society (and savings to government).

#### A *Public Mandate in Respect of a Take-Down Scheme*

An obvious benefit of any regulatory option is public support for that option.<sup>162</sup> Naturally, where there is public support for a particular option there is a greater chance that the government will be prepared to legislate to introduce it. Public support is also important in securing enforcement and compliance. When referring to the ‘public’ mandate, however, it is important to bear in mind that there are various sections of the public whose interests will not necessarily coincide. For example, the views of those who would be required to comply with any new laws, perhaps at some cost, would likely differ from the views of those who stand to benefit most from the laws. The views of a diverse range of stakeholders therefore need to be considered: an exercise which, in practice, involves extensive public consultation on the various options presented.

Given that this thesis is concerned with children and takes a child rights-based approach to the issue of unwanted online publication of images or their use, an essential component of any option adopted should be that it gives due weight to the views of children.<sup>163</sup> Taking account of children’s views is also central to the concept of children as digital citizens, whereby children as active participants in the digital world are seen as having both rights and responsibilities in relation to accessing, creating and sharing content.<sup>164</sup> However, as is noted below, there is a paucity of research on the views of children and young people regarding online publication of images or their use. Therefore, further research in this area is one of the key recommendations to come out of this thesis.

Any proposal to introduce a take-down scheme for images of children would need to be subject to public consultation. However, given some of the submissions made to the government’s consultation on its Enhancing Online Safety for Children proposals, there is likely to be significant opposition to such a scheme from a number of quarters.

In 2014 the Australian Government undertook a process of public consultation on its proposals to enhance online safety for children by, among other things, the institution of a rapid removal scheme for ‘harmful’ content targeted at an Australian child.<sup>165</sup> A number

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<sup>162</sup> Australian Government, ‘The Australian Government Guide to Regulation’ (2014) 45, which refers to ‘consultation as a way to improve decisions’.

<sup>163</sup> Refer to the discussion in Chapter Five about the Right of the Child to be heard under *CRC* art 13.

<sup>164</sup> ACMA, *Cross-border Regulatory Strategies: Case Studies in Regulatory Practice for a Networked Economy and Society*, October 2013, 10 (‘Citizen Empowerment’).

<sup>165</sup> The Australian Government’s discussion paper, *Enhancing Online Safety for Children*, referred to ‘material targeted at and likely to cause harm to an Australian child’, Australian Government, Department of Communications, Australian Government, *Enhancing Online Safety for Children: Public Consultation on Key Election Commitments*, January 2014, 11. However, the *Online Safety Act* ultimately limits the scheme to ‘cyberbullying material targeted at an Australian child’.

of submissions were opposed to the scheme on various grounds, including that it would represent a serious threat to freedom of expression,<sup>166</sup> would be ineffective<sup>167</sup> and would be unrealistic<sup>168</sup> or unnecessary.<sup>169</sup> That proposed scheme was intended to be limited to the takedown of ‘harmful’ material, which was not defined in the consultation paper but which was apparently intended to apply to ‘cyberbullying material’ (indeed the scheme actually introduced is limited to ‘cyberbullying material targeted at an Australian child’). As such, it can be assumed that there would be even greater opposition to a take-down scheme not limited to cyberbullying material but which took the position, as is suggested here, that the ongoing publication or use of images of a child, where that is unwanted by the child in question, is presumed to be contrary to the child’s best interests. A scheme

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<sup>166</sup> See, eg, The Australian Council for Computers in Education, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 4 March 2014, 9: ‘Care must be taken to ensure that such a scheme does not seriously restrict the freedom of speech of adults, nor the capacity of minors to discuss matters of importance to them in private. The focus of the scheme should remain on addressing inappropriate behaviour, bullying and harassment rather than content regulation.’ See also Electronic Frontiers Australia, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 11 March 2014, 2; Institute of Public Affairs, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 14: ‘Rather than focussing on the elimination of the harmful conduct — that is, sustained harassment — the proposal simply censors individual acts of expression.’

<sup>167</sup> See, eg, Australian Information Industry Association, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, March 2014, 4: ‘The proposal assumes that a government agency has the capacity to make these judgments on each case put in front of it, which is not realistic in our view. We consider this approach to potentially have a high ‘error rate’, thereby having limited effectiveness to reduce harm to children.’ See also Child Wise and PricewaterhouseCoopers Australia: Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 7 March 2014, 5: ‘the Government would face a number of challenges in enforcing a mandatory rapid removal scheme on participating social media sites. Almost all participating social media sites are headquartered or managed offshore, and the Government has no punitive power with which to force sites to comply’ and ‘A mandatory, legislated rapid removal scheme is not the most effective way of reducing instances of cyber-bullying on social media sites. Rapid removal of offensive content is a reactive step that at best can only mitigate the damage that has already been done’ legislated mandatory take down scheme is not the most effective way to combat cyberbullying — is reactive and can only mitigate damage already done’: at 6. See, eg, Electronic Frontiers Australia, above n 166, 2–3: the legislation would be ‘unworkable, inflexible and ultimately ineffective in addressing issues of harm and noting that the scheme would not apply to social media services with no operations in Australia; and see Google Australia Pty Ltd, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 7 March 2014, 4: ‘The proposed scheme is not flexible enough to respond to rapid changes in technology and consumer activity. A cooperative approach would be much better placed to adapt to changing technologies and provide a faster response, at scale.’

<sup>168</sup> See, eg, Child Wise and Google PricewaterhouseCoopers Australia, above n 166, 5: ‘attempting to legislate the boundaries of social networks that pose a risk to children is an unrealistic goal’. See also iiNet, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 7 March 2014, 2: ‘the ubiquitous nature of the internet makes the implementation of any kind of legal framework both difficult and expensive’.

<sup>169</sup> See, eg, AIMIA Digital Policy Group, above n 107, 2, suggesting that there is a lack of evidence that current reporting mechanisms are not working as intended; Facebook, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children*, Discussion Paper, 7 March 2014, 10–11: It is not clear that the problem is that current reporting mechanisms are inadequate rather than that Australians do not know that they can or how to report content on a social media site.

that did not provide exemptions for media would also be strongly objected to by media interests, and this would add to the challenge of enacting relevant legislation.

On the other hand, many of the loudest voices in opposition to the rapid removal scheme proposed by the Enhancing Online Safety for Children consultation were raised (unsurprisingly) by industry groups representing the interests of those who would be likely to incur costs in implementing any take-down requests. That is, they were raised by internet intermediaries and internet content hosts such as Facebook, Google and lobby groups representing the interests of these stakeholders. It is possible that if these interests are put to one side, a broader social mandate for the introduction of a take-down scheme for images, in one or other of the forms referred to, might be discernible. It has been observed in the context of consultation on the Enhancing Online Safety for Children proposals that although 'industry is opposed to heavy handed regulation', child protection organisations and education bodies had 'advocated strongly' for such a scheme.<sup>170</sup>

Importantly, in determining any social mandate the views of children themselves are fundamental and must be taken into consideration. In this regard, Chapter Five has already referred to the fact that there appears to be general support among young people for greater control over their images in the online environment, including support for the ability to take-down an image where the image subject has not consented to its posting. Nevertheless, it is clear that more research would be needed as to the views of young people specifically vis-a-vis an image take-down scheme,<sup>171</sup> as well as to the views of the broader society.

## B *Burdens*

In terms of the burdens of any regulatory options considered, this chapter limits itself to considering two areas: fiscal costs, and the difficulties of implementation and enforcement. Each of these areas is expanded upon below.

### 1 *Fiscal Costs*

In accordance with the Australian Government's Guide to Regulation, the 'Regulatory Burden Measurement Framework' is to be used to quantify the likely regulatory costs on business, individuals and community organisations imposed by any new regulations or changes to existing regulations.<sup>172</sup> The Regulatory Burden Measurement Framework, as outlined in a Guidance Note to the Framework, requires that consideration be given to the various types of regulatory costs, namely compliance costs and delay costs.<sup>173</sup> Compliance costs are further divided into substantive compliance costs, defined as those

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<sup>170</sup> Explanatory Memorandum to Enhancing Online Safety for Children Bill 2015, Appendix D, 41.

<sup>171</sup> The ALRC noted in its 2008 report that there was still 'limited Australian research on the attitudes of young people to privacy': ALRC, *For Your Information*, above n 10, 2224 [67.11].

<sup>172</sup> Commonwealth of Australia, *Guide to Regulation*, above n 1, 32.

<sup>173</sup> Department of the Prime Minister and Cabinet, Office of Best Practice Regulation, Australian Government, *Regulatory Burden Measurement Framework*, Guidance Note (February 2016) 2.

which are ‘incurred to deliver the regulated outcomes being sought’, and administrative costs, which are those ‘incurred primarily to demonstrate compliance with the regulation’.<sup>174</sup>

Examples of substantive compliance costs are costs associated with staff training, the purchase or maintenance of plant and machinery, costs associated with providing information to third parties, operational costs and the costs of any professional services that are required to ensure compliance (for example, legal and accounting advice).<sup>175</sup>

Examples of administrative costs are those associated with making, keeping and providing records and notification to government, conducting tests, making applications and any compliance costs associated with financial costs, for example, the time taken to pay a licence fee, as well as costs relating to time spent to demonstrate compliance.<sup>176</sup>

Delay costs are expenses and any loss of income incurred by a regulated entity and that are associated with delays related to submitting an application or awaiting approval before a particular operation can commence.<sup>177</sup> It is not anticipated that a take-down scheme for images would entail delay costs. This is because none of the reform options presented makes the commencement of a particular activity or process contingent upon any application or approval process. Therefore, delay costs are not considered further in the context of undertaking a cost/benefit analysis of the take-down scheme outlined above.

A number of costs are excluded from the Regulatory Burden Measurement Framework. Without listing here all excluded costs, they include opportunity costs (‘the value of opportunities that cannot be realized because of the regulatory intervention’)<sup>178</sup> and taxes and charges payable to government as a result of regulation being introduced or amended.<sup>179</sup> Also excluded are any costs of non-compliance, including fines and legal and process fees.<sup>180</sup> For that reason, these costs are also not considered here.

Actual costing of the take-down scheme proposed in this chapter is beyond the scope of this thesis. Nevertheless, it is important to provide a brief overview of the types of costs that will be incurred as a result of the implementation and enforcement of this option, and to consider who will bear the burden of these.

A take-down scheme would potentially entail significant additional costs for content hosts and publishers subject to the scheme, in order to ensure compliance. As already noted in the previous section, costs associated with taking-down content might include the ‘cost’

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<sup>174</sup> Ibid.

<sup>175</sup> Ibid 3.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid 4.

<sup>180</sup> Ibid.

of staff time in locating and removing relevant material, as well as costs related to the institution of systems and processes. There may well be indirect costs, such as ‘reputational’ damage and even loss of business if a content host is seen to favour other’s interests over those of their users or customers. This is particularly a risk if images are removed upon receipt of a take-down request from (or on behalf of) the image subject rather than upon direction from a regulator. The scope of any take-down scheme would impact the extent to which reputational damage was incurred and business lost. Limiting the scheme to large social media sites, for example, could result in a migration of accounts to smaller services.

Content hosts might also need to develop tools to allow for the reporting of images, as well as to assist with verification of the identity of the image subject. It is possible that services hosting the content of others, such as social media platforms, would need to incur costs in amending terms and conditions of service. For example, while social media sites often reserve to themselves broad discretion to remove content that violates their terms and conditions, the posting of ‘benign’ images of others would not necessarily constitute a violation of those terms and conditions.<sup>181</sup>

The scope of any take-down scheme naturally influences the costs associated with compliance. A scheme that allowed the take-down of material on the basis of an image subject’s reasonable interests would potentially entail a relatively high volume of requests. In addition, a non-participatory scheme, or one that applied to a broad range of content hosts, would be more expensive. In the Regulation Impact Statement that forms part of the Explanatory Memorandum to the Enhancing Online Safety for Children Bill 2015, it is noted that the costs of a participatory take-down scheme, with incentives for participation, would be less than those associated with a non-participatory scheme. This is because social media sites that choose to participate would already have systems and procedures in place to deal with the investigation and implementation of removal requests.<sup>182</sup> Likewise, a participatory take-down scheme modelled on similar lines to the rapid removal scheme set up under the *Online Safety Act*, or one limited to large social media sites, would probably entail fewer costs, given that social media sites already have processes in place for taking-down material. Additionally, large social media sites have already made significant investments in reporting tools that allow users to report content,

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<sup>181</sup> Facebook, *Terms of Use* <<http://www.facebook.com/terms/provisions/german/index.php>> 5(2) allows Facebook to remove content which violates their terms, which include commitments by users not to upload content that violates someone else’s rights or the law. There is no obligation to remove the content, although Facebook does state that it will ‘remove content, disable accounts or work with law enforcement when we believe that there is a genuine risk of physical harm or direct threats to public safety’: Facebook, *Community Standards*, Helping to Keep you Safe <<https://www.facebook.com/communitystandards>>. Content will violate Facebook Terms where it is threatening or poses a risk of physical harm and if it is graphic, including where it depicts nudity, and where it amounts to bullying or harassment, including where it identifies and shames or degrades individuals: Facebook, *Community Standards* <<https://www.facebook.com/communitystandards>>.

<sup>182</sup> Explanatory Memorandum to Enhancing Online Safety for Children Bill 2015, Appendix D, 42.

and would likely be better placed than other content hosts to verify the age and identity of complainants.<sup>183</sup>

In terms of the cost to the Australian economy, the introduction of a broad-ranging take-down scheme for images could deter content hosts from establishing an Australian presence.<sup>184</sup> Moreover, Australian participants may be unduly disadvantaged.<sup>185</sup> This is directly related to challenges of enforcement, which are discussed below. There are also societal costs involved in establishing the regulatory processes around a take-down scheme — this would include funding a regulator to issue or moderate take-down requests. However, some of these costs would be reduced if additional functions were given to an existing office holder — such as the e-Safety Commissioner.

## 2 *Enforcement and Implementation Difficulties*

One of the biggest challenges of a take-down scheme for images would be the challenges of enforcement of such a scheme vis-a-vis individuals or entities not located in Australia. This was recognised by the ALRC in its 2014 report on Serious Invasions of Privacy, in which the ALRC acknowledged that a take-down mechanism may have limited effect where material is hosted overseas.<sup>186</sup> The challenges of enforcement in relation to material hosted overseas were also noted by the government in its discussion paper on Enhancing Online Safety for Children: ‘where a social media site is not located, or does not have a sufficient presence in Australia, enforcement of the ... regulatory measures is likely to be more difficult.’<sup>187</sup> A number of submissions made to that discussion paper touched on enforcement issues. The Australian Federal Police, for example, explains that it relies on the cooperation of international companies in support of law enforcement operations.<sup>188</sup> ACMA has noted that:

Global supply chains and the enhanced capacity of citizens to create and distribute content can result in complex cross-border regulatory problems that often require the involvement of an expanded set of participants across industry sectors to contribute to market-based and regulatory solutions.<sup>189</sup>

In a submission to the ALRC, ACMA notes the existence of formal mechanisms both in Australia and internationally to ensure the rapid removal of illegal content.<sup>190</sup> However, the majority of images subject to a proposed take-down scheme would neither be ‘illegal’

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<sup>183</sup> Ibid.

<sup>184</sup> See, eg, Facebook, Submission to Department of Communications, above n 169, 11–12.

<sup>185</sup> See, eg, ACMA, *Cross-border Regulatory Strategies*, above n 164, 2.

<sup>186</sup> ALRC, *Serious Invasions of Privacy*, above n 10, 314 [16.17].

<sup>187</sup> Department of Communications, Australian Government, *Enhancing Online Safety for Children: Public Consultation on Key Election Commitments*, January 2014, 17.

<sup>188</sup> Ibid.

<sup>189</sup> ACMA, *Cross-border Regulatory Strategies*, above n 164, 10 (‘Complex Environment’).

<sup>190</sup> ACMA, Submission No 121 to ALRC, *Serious Invasions of Privacy in the Digital Era*, May 2014, 4.



nor contrary to social norms — either in Australia or overseas. In this context offshore enforcement is even more problematic.

One way to increase the enforceability of regulations relating to online content hosted overseas is through international treaties or agreements. In the field of copyright, for example, established treaties and agreements underpin regulatory strategies.<sup>191</sup> Developing new international agreements with respect to the protection of children against harm in relation to the internet and digital media is something that has been canvassed by some. For example, in the context of its submission to the Australian Government's consultation on enhancing protection for children in the online environment, BoysTown commented as follows:

There is currently international concern about cyber-bullying and other cyber-risks to children and young people. Consequently there may be scope to develop an international treaty to respond to this issue.

One practical option to advance this matter would be through a review of the current *Convention on the Rights of the Child*. This Convention was originally endorsed by the United Nations General Assembly in 1989 prior to the widespread adoption of information technology. The Australian Government through its United Nations representatives could propose that the Convention be reviewed in light of advancements with Information Technologies and our contemporary understanding of impacts on children from cyber malpractices. Possibly an Addendum to the current Convention could be developed in respect to cyber related issues. Signatories to the Convention which includes most countries would then be responsible for developing domestic legislation to give effect to any new provision of the Convention.<sup>192</sup>

The possibility of adopting a new Optional Protocol, or even a new *CRC* on digital media and children's rights, was also addressed during the Committee on the Rights of the Child's 2014 day of general discussion on 'Digital Media and Children's Rights'. In response to this proposal, however, a number of participants cautioned that new legal instruments could create uncertainties, and that building upon existing norms and standards, and ensuring their effective implementation, was preferable.<sup>193</sup> However, the importance of applying a 'digital-age specific interpretation of every article, adapted to today's realities' was stressed.<sup>194</sup> Ultimately, then, greater international consensus on the publication of images of children would assist in developing appropriate and enforceable legal responses. At present, the lack of in-depth research on the effects of non-consensual publication of

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<sup>191</sup> ACMA, above n 164, 14–15.

<sup>192</sup> BoysTown, Submission to Department of Communications, Australian Government, *Enhancing Online Safety for Children: Public Consultation on Key Election Commitments*, 7 March 2014, 6.

<sup>193</sup> Committee on the Rights of the Child, Report of the 2014 Day of General Discussion: 'Digital Media and Children's Rights', 2014, 10 [46].

<sup>194</sup> *Ibid.*

images of children and young people on development is a barrier to developing that consensus.

Aside from the difficulties associated with the enforcement of a take-down scheme outside of Australia there are difficulties inherent in any regulation of online information. Thierrer has outlined five unique problems for information control efforts: (1) media and technological convergence; (2) decentralised, distributed networking; (3) unprecedented scale of networked communications; (4) an explosion in the overall volume of information; and (5) unprecedented information sharing through user-generation of content and self-revelation of data.<sup>195</sup> In the present context, the first of these problems is essentially concerned with the fact that an image, once online, can be reproduced across various platforms and media, often instantaneously. For example, an image from one Facebook page can be republished on a news service website, be tweeted and retweeted, find its way into printed press, be used to illustrate a blog and so on. The second of these problems notes the 'mercurial nature' of information in digital form.<sup>196</sup> The other problems are self-explanatory. It is clear that these problems would certainly present challenges to the operationalisation of a take-down scheme in relation to images. At the same time, many of them contribute to the potential harm that can arise due to the unwanted online publication of an image or its subsequent use. Thierrer posits that due, in part, to these challenges, it makes more sense to consider alternative, less restrictive approaches, such as education, awareness-building and empowerment strategies.<sup>197</sup> While it is agreed that such strategies are indeed necessary, it is here submitted that a regulatory approach in the form of a take-down scheme should not be ruled out on the basis that its efficacy may be limited. This is echoed in the ALRC's response to concerns raised about enforcement of a take-down scheme for privacy-invasive material, where the ALRC expressed the view that the 'possibility of the mechanism having limited effect in some cases is not, in itself, a reason not to make the mechanism available in those cases where it may be effective.'<sup>198</sup> The words of the Hon. Michael Kirby, albeit in relation to protection of privacy, are also worth recalling: 'I do not pretend that it is easy to safeguard privacy in the current age. But surrendering the endeavour as just too difficult to achieve is not an option.'<sup>199</sup>

The constitutionality of a take-down scheme such as that described above is not likely to be an issue. The Commonwealth has power under section 51(v) of the *Australian*

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<sup>195</sup> Adam Thierrer, 'A Framework for Responding to Online Safety Risks' in in Simone van der Hof, Bibi van den Berg and Bart Schermer (eds) *Minding Minors Wandering the Web: Regulating Online Child Safety* (Springer, 2014 (24)) 40, 52-3.

<sup>196</sup> Ibid 54.

<sup>197</sup> Ibid 56.

<sup>198</sup> ALRC, *Serious Invasions of Privacy*, above n 10, 314 [16.17].

<sup>199</sup> Michael Kirby, 'Privacy, MySpace, YouTube and Facebook: Can the Law Cope?' (Speech delivered at Office of the Victorian Privacy Commissioner, Melbourne, 1 September, 2009) <https://www.privacy.vic.gov.au/privacy/web2.nsf/files/michael-kirby-privacy-oration> 11.

*Constitution* in respect of ‘postal, telegraphic, telephonic and other like services’. This power has been relied upon, for example, to make provisions in respect of the classification of online and mobile content.<sup>200</sup> The Commonwealth could also rely on the external affairs power in section 51(xxix) if such legislation is designed to recognise Australia’s international obligations under the *CRC*. Any legislation implementing a take-down scheme would, however, need to contain constitutional safeguards — such as by providing that it would not apply to the extent that it would impinge on the constitutional doctrine of implied freedom of political communication and would not be exercised in such a way as to prevent the exercise of the powers, or the performance of functions of a government of a state or territory.<sup>201</sup>

### C *Net Benefit*

In summary, a take-down scheme could provide children or possibly their representatives with the ability to call for the removal of their image from publication in the online context, or generally. A scheme accessible to children based upon a child’s reasonable interests could significantly reduce children’s vulnerability to harm arising from unwanted publication. However, a take-down scheme cannot entirely solve the problem with which this thesis is concerned, given that it would not prevent the publication of images in the first place.

Given that the justificatory basis of any law reform options presented in this chapter is the child’s right to development, a scheme that took no account of competing public interests, including interests in freedom of expression, is clearly unsupportable. In this regard, there is inherent tension between the rights and interests of those publishing, sharing, hosting and accessing images and those who are the subject of an image. There is also the potential for tension between the interests of image subjects themselves — where there is more than one. Striking an appropriate balance between these competing interests would be essential to the design of any take-down scheme. One way to strike a balance, as discussed above, is to limit a take-down scheme to images that are contrary to an image subject’s ‘reasonable interests’. As to what those interests are in a given case, a non-exhaustive list of criteria, such as those enumerated in Part Three, Section F could be taken into account. Such a scheme could provide important protection for children, although exceptions could apply for images used in a media context.

This section considered a take-down scheme limited to online material, rather than one that would apply to offline images. It was noted that the discussion in this thesis cannot support a scheme that applies to images published offline, even if the image was initially published online. Nevertheless, it would be difficult to justify treating offline publication of images taken from the internet differently to the offline publication of images taken

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<sup>200</sup> ALRC, *National Classification Scheme Review*, Discussion Paper no 77, 30 September 2011, 214 [13.16].

<sup>201</sup> Such as are included in the *Online Safety Act*— see Explanatory Memorandum to Enhancing Online Safety for Children Bill 2015, 95 (relating to cl 100) 96 (cl 102).

from a different source. The broader question as to whether a take-down scheme should apply in respect of any unwanted publication of an image, regardless of the medium of publication and the source of the image, is therefore an important one; one that is not resolved in this thesis, but should be examined more closely in future research.

There are significant costs associated with any take-down scheme, as well as practical issues associated with enforcement and implementation. While the challenges of enforcement are not easily surmountable, this is not necessarily a reason to reject outright a scheme that would still have some impact. Ultimately, whether the benefits of such a scheme would be worth the associated costs and enforcement challenges would need to be considered further. In this regard, it is essential to obtain greater insight into and evidence of the long-term risks and harm associated with the online publication of images. Hence it is a key recommendation of this thesis that further research needs to be undertaken into the developmental implications of the unwanted online publication of images or their subsequent use.

Having determined that a take-down scheme is the only option among those presented that is likely to be effective in solving the problem with which this thesis is concerned, the following part of the chapter offers some general conclusions.

## V CONCLUSIONS

A take-down scheme for images of children, in the form outlined in Part Three, Section F of this Chapter, is the only option from those presented that addresses the problem with which this thesis is concerned directly rather than incidentally. As such, the option can be tailored to address that problem in a way which achieves the best balance between the interests, rights and freedoms of an image subject who is a child against the interests, rights and freedoms of others affected by the removal or threat of removal of an image. It is submitted that a reasonable interests test achieves this balance. It has been argued that a take-down scheme should not be limited to the removal of material from social media services. Whether any such take-down scheme should be limited to the removal of images from an online medium or media, however, is an important question that could be resolved through further consultation and the use of evidence as to the extent of harm arising from publication in 'offline' contexts. It was noted that the arguments made in this thesis have focused on the developmental harm arising from online publication. There are also important questions as to whether certain publishers or information providers such as the media should be exempt from any such take-down scheme.

In concluding that a take-down scheme is the best option, it is necessary to bear in mind, however, that not all information necessary to properly evaluate each option is available. As noted in the previous part of the chapter, there has been no public consultation on the introduction of a take-down scheme in relation to images of children. Neither has there been any significant public consultation in respect of other options canvassed (other than

the introduction of a statutory cause of action for invasion of privacy and, to a far lesser extent, the introduction of an APP requiring the deletion of personal information in certain circumstances). Moreover, a full cost/benefit analysis of each option has not been undertaken in this chapter.

It is also important to realise that a take-down scheme cannot offer a complete solution to the problem. This is for a number of reasons, not the least of which is that the mere existence of a legal mechanism that provides an image subject with greater control over their image does not ensure that the mechanism can or will be accessed. There may be practical or other issues that affect an individual's ability or willingness to access the relevant legal tools. For example, the cost and complexity of legal processes can represent real barriers to children and young people in accessing the legal tools that would otherwise give them greater control. Moreover, even when legal remedies exist, enforcement might be difficult and the efficacy of such a scheme is also constrained by the unique problems of regulating online information that were discussed in Part Four, Section B above. Another reason why a take-down scheme cannot offer a complete solution is because there is a need to balance the interests, rights and freedoms of children who are the subject of an image or images with the interests, rights and freedoms of those who capture and share images, as well as those who use them or make available the means by which others are able to publish them (for example, social media providers that make it possible for people to upload images and share them with others). In particular, given that this thesis advocates a child-rights approach to the problem of the unwanted publication of online images of children, the rights and freedoms of other children and young people must be respected. Therefore, it is necessary to recognise the fact that neither the right to development, nor the right to privacy, nor any other right set out in the *CRC* that provides the basis for a legal response to the problem with which this thesis is concerned, is absolute.

A take-down scheme also has inherent limitations — most fundamentally, perhaps, the difficulties of enforcement.

Although this option is likely to be more costly than many of the other options considered, some of those costs can be offset by utilising the existing framework created by the rapid removal provisions of the *Online Safety Act*.

Reaching the conclusion that a take-down scheme is the option best suited to address the problem with which this thesis is concerned is not to say that such a scheme should be implemented to the exclusion of the other law reform options presented in this chapter. Rather, it is suggested here that this option should be viewed as one tool among the various regulatory and non-regulatory tools that would be needed to provide an adequate response to the risks of harm outlined in this thesis. Some of the other options discussed are also important tools in providing this response. A cause of action for invasion of privacy has been recommended by the ALRC to fill gaps in Australian law and to more fully

implement into Australian domestic law the right to privacy enshrined in Article 17 of the *International Covenant on Civil and Political Rights*.<sup>202</sup> Widespread consultation with a diverse range of stakeholders has been undertaken in respect of that option and, it is submitted, the failure to enact legislation giving effect to it represents continued failure on the part of the Australian Government to fully respect and protect a fundamental right in accordance with its international obligations to do so. Former High Court Justice the Hon Michael Kirby recently described Australia's lack of adequate privacy protection as 'unacceptable'.<sup>203</sup>

Further consideration should also be given to the insertion in the *Privacy Act* of a requirement on the part of APP Entities to delete data in certain circumstances. The ALRC has observed that the current APPs may not offer individuals a 'simple mechanism to request the destruction or de-identification' of personal information. A right to delete has been described as a crucial weapon against data vulnerability and the promotion of individual autonomy,<sup>204</sup> and the importance of such a right to delete has long been recognised in Europe, and is enshrined in the current Data Protection Directive as well as in the Proposed Data Protection Regulation.

A requirement to anonymise or de-identify images could, in many circumstances, represent a useful compromise between the rights of an image subject and the rights of third parties or other image subjects, particularly if this was used in conjunction with a take-down scheme, achieving a better balance between competing rights and interests than the take-down of images alone.

Although Mayer-Schönberger's code solution to the persistence of personal information is unlikely to address the problem with which this thesis is concerned, code solutions to the problem may ultimately prove to be the most effective, particularly if they are able to overcome the problems of enforcement that are inherent in any solution designed to regulate publication of material in the online environment.<sup>205</sup>

Finally, while this chapter has considered that that a property-rights approach to personal information may be desirable, it was noted that there is still a need to consider the

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<sup>202</sup> ICCPR art 17.

<sup>203</sup> Samantha Woodhill, 'Kirby Fights for Right to Legal Action over Privacy Breaches', *Australian Lawyer* (online) 3 May 2016.

<sup>204</sup> Bernal, above n 71, 206.

<sup>205</sup> An example of code solutions, backed by regulation, is the use of technological measures, such as access controls and copy controls to protect against copyright infringement — such measures may be backed-up by anti-circumvention laws, such as (in the US) those in the *Digital Millennium Copyright Act 1998* and, in Australia, *Copyright Act 1968* (Cth) s 116, s 132APA-132APE and 132AQ-132AT: see, eg, Brian Fitzgerald, 'The Australian Sony PlayStation Case: How Far Will Anti-circumvention Law Reach in the Name of DRM' *International Conference on Digital Rights Management: Technology Issues, Challenges and Systems (DRMTICS)* (November 2005). Still in relation to copyright, the Australian Productivity Commission has recently noted that 'Over time, further technological developments will likely reduce the costs of collecting societies, and also their need.' Productivity Commission, Australian Government, *Intellectual Property Arrangements*, Draft Report, April 2016, 136.

mechanisms by which this right could be realised. As such, a property-rights approach should not be viewed as a potential law reform option in itself, but rather as a particular approach to regulation that could underpin various concrete law reform options.

Having considered a number of law reform options and determined which among them offers the greatest net benefit in terms of addressing the problem with which this thesis is concerned, the following chapter summarises the research in this thesis on a chapter by chapter basis and sets out the key findings and recommendations arising from it.

# CHAPTER SEVEN – SUMMARY, RECOMMENDATIONS AND CONCLUSIONS

## I INTRODUCTION

The central proposition of this thesis is that Australian law should be reformed to give children greater control over their image in the online environment than they currently enjoy. In arguing for that proposition this thesis identified the problem to which a solution is sought, explained why government action is needed and proposed a solution or partial law reform solution to the problem, having evaluated a number of options. The approach taken in this research has been based around most of the RIS questions contained in the Australian Government's Guide to Regulation,<sup>1</sup> and enumerated in Chapter One. This allowed the thesis to adopt an applied approach, bearing in mind that, as noted in Chapter One, policy research is, essentially, pragmatic.<sup>2</sup> The RIS framework itself also serves as a reminder that 'regulation necessarily carries with it its own costs'.<sup>3</sup> The RIS approach also provides a useful and 'robust' framework to evaluate regulatory proposals.<sup>4</sup>

The purpose of this concluding chapter is to briefly summarise the previous chapters, articulate key findings and offer some recommendations to address the problem with which this thesis is concerned. The structure of the remainder of this chapter follows the RIS framework so that Part II refers back to and summarises Chapters Two to Six, thus restating the problem with which this thesis is concerned, explaining why government action is necessary and proposing and evaluating law reform solutions. Part III then highlights a number of key findings from the research before moving on, in Part IV, to outline a number of recommendations and finally, in Part V, to offer some concluding statements.

## II SUMMARY OF CHAPTERS ONE TO SIX

### A *Restating the Problem*

Chapter One noted that images, in all forms, are powerful and while they often appear to evidence reality, they can be easily manipulated. The nature of photographs and videos provides a broader context for a particular moment and can allow for 'ongoing

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<sup>1</sup> Commonwealth of Australia, Department of Prime Minister and Cabinet, *The Australian Government Guide to Regulation* (2014).

<sup>2</sup> Terry C Hutchison, *Developing Legal Research Skills: Expanding the Paradigm* (2008) 32 *Melbourne University Law Review* 1065, 1084.

<sup>3</sup> Paul L Joskow, 'Market Imperfections versus Regulatory Imperfections' (2010) 3 *CESifo DICE Report*, 5.

<sup>4</sup> *Ibid* 6, 7.



objectification of the subject, and therefore ongoing harm.’<sup>5</sup> This is particularly so when an image is disseminated online. This chapter noted that ‘the ubiquity of the internet and the level of exposure afforded by online publication means that an image which, in the past, may have resided in relative obscurity is now potentially able to be viewed by millions for an indefinite period of time.’<sup>6</sup>

Chapter Two considered other factors that make children vulnerable to harm from the online publication of an image, or the use of an image online. That chapter critically evaluated research relating to the effect on child development of the use or publication of an image and, in particular, the online publication of an image or its subsequent use (research objective (1)). The chapter noted that literature was clear that bullying in the form of unwanted publication and use of images was a particularly impactful form of bullying but that the reasons for this were not explored in the literature on cyberbullying. The chapter therefore sought to offer an explanation as to why images are so impactful and, in doing so, explored some of the developmental implications for an image subject of unwanted online publication or use of images by others. It was noted that there is a risk of harm to self-esteem and relationships due to the unwanted publication or use of online images. Where that harm eventuates, there are implications for a child’s development. It was noted that the unwanted online publication of an image of a child or its subsequent use is not necessarily negative. However, there is a need for great caution in suggesting that the potentially harmful repercussions of the unwanted online publication or distribution of images are outweighed by the potential benefits vis-a-vis a particular individual. Nevertheless, the chapter noted that any response to the problem of unwanted online publication of images of children or their subsequent use, must consider the net impact on children’s development, which includes, but is not limited to, their right to freedom of expression.

In particular, Chapter Two drew two findings from an analysis of the literature. The first finding was that a detrimental effect on development can occur even when the publication or use of an image of a child or young person is not ill-intentioned. The second finding was that detriment can occur regardless of whether or not an image can be described, objectively, as harmful. These findings have important implications for the design of any legal response to the problem of the unwanted online posting or use of images. They are discussed further in Part Three below.

Chapters Three and Four identified and illustrated the extent to which Australian law gives children the ability to control the use or publication of their image, particularly in the online context (research objective (2)). These chapters also considered and illustrated the extent to which the use or publication of an image of a child or young person, particularly

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<sup>5</sup> SCAG, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper (2005) 12, 13 [54].

<sup>6</sup> Chapter One, Part Three, section B.

in the online context, is regulated by codes of conduct and other forms of self- or co-regulation (research objective (3)).

Taken together, Chapters Three and Four demonstrated that the extant legal framework provides children with very limited redress in relation to the unwanted publication of an image online or its subsequent use. In this sense, it is possible to conclude that the risk of harm outlined in the thesis is not adequately addressed by that legal framework.

In summary, Chapters One to Four all contributed to illustrate the central problem with which this thesis concerned: that the unwanted online publication of an image, or the unwanted use of such an image, exposes children to the risk of developmental harm. One important factor that contributes to that vulnerability is the fact that children have insufficient control, in a legal sense, over the publication and use of online images of themselves.

The following part of this chapter explains, by reference to Chapter Five of this thesis, why government action is needed to address this problem.

### *B Why Government Action is Needed*

Although a partial solution to the problem with which this thesis is concerned can be found through law reform, it is necessary to consider why a legal solution as opposed to a non-legal solution is necessary, and on what basis it can be justified. Other and even better solutions might be found through other forms of 'regulation'. As noted in Chapter Five, Lessig identified four regulators of cyberspace: the market, social norms, the architecture of the internet (or 'code') and the law. Chapter Five considered whether these regulators, other than law, could provide a solution to the problem identified in this thesis, and concluded that they could not.

Given the imperfections of three of Lessig's four regulators of cyberspace, Chapter Five concluded that a legal response was required (research objective (5)). A justificatory basis for that response (research objective (6)) was then considered. In this respect the Australian Government's obligations to children under the *CRC* were examined (research objective (4)). Particular rights and principles under the *CRC* were discussed, specifically the core principles of the right of the child to be heard and the best interests principle. The rights to privacy, development and freedom of expression were also discussed. The chapter concluded that the right to development in the *CRC* can provide a justificatory basis for a regulatory response to the problem of the unwanted online publication of images of children or their subsequent use. This conclusion is discussed further in Part III below.

In summary, Chapter Five illustrated that government action is needed, in the form of law reform, due to the failure of the market, social norms and the architecture of the internet

(its code), to address the problem that the unwanted online publication of an image, or the unwanted use of such an image, exposes children to the risk of developmental harm.

### *C What is the Best Regulatory Response to the Problem?*

In light of the problem identified and illustrated in Chapters One to Four and the need for government action identified in Chapter Five, Chapter Six proposed a number of law reform options. The efficacy of each of those options in addressing the problem that the unwanted online publication of an image, or the unwanted use of such an image, exposes children to the risk of developmental harm was considered. This chapter concluded that only one of the options — a statutory take-down scheme in respect of the online publication of images of children — would be at all effective, albeit that none of the options could entirely solve that problem. Recognising that further consultation would be needed on the form and scope of that take-down scheme, the chapter did, however, recommend that the scheme be enacted in Commonwealth legislation, that it be overseen by a regulator in the first instance, and that it would be based around the reasonable interests of the child or children the subject or subjects of the image. A cost/benefit analysis of a statutory take-down scheme in that form was then undertaken.

This chapter concluded that a take-down scheme that provides for the removal of online images of children and young people could offer a partial solution to the problem with which this thesis is concerned. The exact form and reach of the scheme would need to be determined through further consultation, but a scheme that considers the reasonable interests of a child would be appropriate. This conclusion is discussed further in Part III below.

## III KEY FINDINGS

This part of the chapter sets out some of the key findings and conclusions arising from this research, followed by a brief discussion of each.

### *A Summary of Findings*

The key findings of this research are as follows:

1. There are gaps in the research on the impact of bullying in the form of unwanted publication and use of images.
2. Even ‘benign’ images and those posted without ill-intent can be harmful.
3. The risk of harm to child development due to the unwanted publication or use of images is not adequately addressed by the extant Australian legal framework (‘the problem’).
4. A regulatory response to this problem is required.
5. The right to development in the *CRC* provides a justificatory basis for the regulatory response to the problem.

6. A statutory take-down scheme for images offers the best solution to the problem, albeit only a partial solution.
7. There is a paucity of research on the views of children and young people regarding attitudes to privacy in general, and to the publication of images or their use in particular.

Each of these findings is now discussed in more detail.

## B *Discussion of Findings*

### 1 *There are Gaps in the Research on the Impact of Bullying in the Form of Unwanted Publication and Use of Images*

Although it is known that the unwanted publication or use of images can be a particularly impactful form of bullying, there are significant gaps in the literature as to why this is. There are also gaps in the research as to the developmental implications for an image subject of the online publication or use of images by others, where that publication or use is unwanted.

As discussed in Chapter Two, the literature around bullying, including cyberbullying, devotes surprisingly little attention to examining the differential impact upon victims of different forms of bullying or victimisation, including that which takes the form of the distribution and sharing of images.<sup>7</sup> Although bullying in this form has been described in a few studies as particularly impactful, why this is has not been explored. In particular, research on bullying generally does not delve into any developmental implications for victims of specific forms of bullying, including that which involves the publication or distribution of images of the victim. Even outside of the context of studies on bullying or victimisation, there is a dearth of literature considering the developmental implications for an image subject of the unwanted online publication or use of images. This finding is key because it is far from clear that this gap has even been acknowledged and yet, unless and until it is and until further research into the developmental impact of the unwanted publication of images of children and young people is conducted, responses (whether regulatory or otherwise) to the problem of bullying may be inadequate, and other risks to children and young people arising from the practice of the unwanted online publication of images may not be clearly articulated and addressed.

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<sup>7</sup> A factor recognised by Vera Slavtcheva-Petkova et al who notes that '[i]n terms of identifying what types of harm are associated with cyber-bullying, only around a quarter of the articles explicitly operationalize the concept of harm. The remainder either define cyber-bullying as involving harm or assume cyber-bullying equals harm. A clear picture of the negative impacts associated with the different contexts or manifestations of cyber-bullying is therefore difficult to form': Vera Slavtcheva-Petkova et al, 'Evidence on the Extent of Harms Experienced by Children as a Result of Online Risks: Implications for Policy and Research' (2015) 18(1) *Information, Communication & Society* 48, 55–56.

## 2 Even 'Benign' Images and Those Posted without Ill-Intent Can be Harmful

Two other important findings were reached in Chapter Two. Firstly, the publication or use of an image of a child or young person can have a detrimental effect on the image subject's development, even where the publication or use is not ill-intentioned. Secondly, a detrimental impact on an image subject can occur regardless of whether an image can be described, objectively, as harmful.

Chapter Two noted that an individual's self-esteem and relationships are fundamental to development. It was noted that in developmental literature the development of self-concept and self-esteem is often considered key to the construction of 'identity'. Identity has, in turn, been described as one of the key developmental goals of adolescence.<sup>8</sup> Moreover, an individual's relationships with others are central to what has been identified as the goals of adolescence: identity formation, autonomy, intimacy and the development of the sexual self.<sup>9</sup>

Chapter Two identified and explained that the unwanted existence or use of an image online can have a detrimental effect on an image subject's self-esteem, as well as on an individual's sense of autonomy and relationships — thus on their development. It was

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<sup>8</sup> Erikson H Erikson, *Identity: Youth and Crisis* (Faber & Faber, 1968) 161. See also Jochen Peter and Patti M Valkenberg, 'Adolescent's Online Privacy: Towards a Developmental Perspective' in Sabine Trepte and Leonard Reinecke (eds), *Privacy Online: Perspectives on Privacy and Self-Disclosure in the Social Web* (Springer, 2011) 221, 224; Laura E Berk, *Infants, Children, and Adolescents* (Allyn and Bacon, 4<sup>th</sup> ed, 2002) 600. Kroger notes that adolescence is a time of transformation in identity: Jane Kroger, *Identity in Adolescence* (Taylor and Francis, 2004) xv, although also observes that questions have been raised about Erikson's proposed timing of development: at 34. Identity itself has been described as both a 'nebulous and contested' concept: Susannah Stern, 'Producing Sites, Exploring identities: Youth Online Authorship' in David Buckingham (ed) *Youth, Identity, and Digital Media* (MIT Press, 2008) 96. See also Nina Huntemann and Michael Morgan, 'Media and Identity Development' in *Handbook of Children and the Media* (Sage Publications, 2<sup>nd</sup> ed, 2012) 305 (describing identity as a complex and problematic concept). One of the criticisms of Erikson's theory of identity is, as noted by Jane Kroger, the fact that it employs 'unclear or imprecise formulations of identity': Kroger, at 34. The process of identity formation during adolescence is subject to varying theories: see generally, Kroger. Erikson believed that adolescents necessarily experienced a period of 'identity crisis' but Berk notes that current theorists do not accept this as a given: Berk at 601. Foddy and Finighan do not agree that a person achieves a 'unified' identity: W H Foddy and W R Finighan, 'The Concept of Privacy from a Symbolic Interaction Perspective' (1980) 10 (1) *Journal for the Theory of Social Behaviour* 1, 4. The exact relationship between self-concept and 'identity' is also not straightforward: some regard identity as a part of self-concept (see, eg, Joel M Charon, *Symbolic Interactionism: An Introduction, an Interpretation, an Integration* (Prentice Hall, 6<sup>th</sup> ed, 1998) 89) whereas others talk more in terms of self-concept as a *facet* of identity (see, eg Berk, at 600 who explains that identity construction involves 'defining who you are, what you value, and the directions you choose to pursue in life'), suggesting that self-definition and value-definition entail self-concept but that directions one chooses to pursue relate to an 'ideal self' or a 'possible self'; others see self-concept and identity as separate albeit related phenomena (see, eg, Foddy and Finighan, at 4: 'An identity, then, involves an individual's idea of the type of person he *wants to be* in the eyes of others, whereas his sense of self involves his perceptions of *how he is seen* by others. Clearly the two concepts are related but they do not just refer to the same phenomenon.').

<sup>9</sup> See, eg, Peter and Valkenberg, above n 8. See also Kaveri Subrahmanyam and Patricia Greenfield, 'Online Communication and Adolescent Relationships' (2008) 18(1) *The Future of Children* 119, 124 drawing on John Hill's claim that adolescent behaviour is best understood in terms of the four key developmental tasks of adolescence: identity, autonomy, intimacy and sexuality.

noted that self-esteem can be adversely affected where a person experiences negative feedback from others on their appearance as well as by a person's purely subjective response to their own appearance. This is because an individual's response to their own appearance is influenced by that individual's *perception* as to how others might see them. This is one reason why the publication or use of an image of a child or young person can have a detrimental effect on the image subject, regardless of whether the image itself can be considered, objectively, as harmful and regardless of the intention of the person posting the image.

Chapter Two discussed the role of impression management, or self-presentation, to the development of positive self-esteem. It was noted that individuals generally aim to create favourable (although not necessarily unrealistic) impressions of themselves, as well as impressions that are consistent with their various identity claims. Relevant to this is 'context collapse', a term used to explain the fact that in the online environment, particularly in the context of social media, discrete audiences are often merged so that information is distributed to all those with access to the online material. The phenomenon of context collapse can make it more difficult for an individual to manage impressions of themselves in an online environment. One consequence of this is that an individual's self-esteem can be lowered if they have created an unfavourable impression of themselves with regards to a particular audience, or even if they just *believe* they have done so. This is another reason why the publication or use of an image of a child or young person can have a detrimental effect on the image subject, regardless of whether the image itself can be considered, objectively, as harmful and regardless of the intention of the person posting the image.

Chapter Two also noted a link between self-esteem and autonomy and the fact that an individual's self-esteem can be affected by the extent to which they are able to control the presentation of self and regulate interpersonal boundaries. An individual's sense of control over how they are represented visually is potentially compromised whenever others make decisions about how they are represented, such as by publishing or sharing images of that individual without their consent. An individual's sense of control is also potentially compromised when they have no capacity to remove an image from publication or prevent it from being further distributed or shared with a particular audience. Crucially, an individual may experience a lack of control even when others are well-intentioned in their decision to post or share images of that individual, or when the images are not inherently embarrassing, harmful and so on.

It was also argued in Chapter Two that the online publication or sharing of an image without the image subject's consent — particularly where that image conflicts with an individual's identity claims — can negatively affect an individual's relationships. The effect on relationships can be more or less direct. It is direct when another person reacts to a particular image in a way that affects the image subject's sense of belonging and feelings

of relatedness with others. The effect is less direct where it occurs due to the impact of publication of an image on the image subject's self-esteem. This is because consequences for an individual's relationships and their sense of connection with others can ensue when self-esteem is negatively impacted. Therefore, the unwanted publication of an image or its subsequent use can impact upon the child or young person's development even where the image itself might not be judged, objectively, as harmful and even where the person publishing or using the image had no ill-intent.

### *3 The Risk of Harm to Child Development Due to the Unwanted Publication or Use of Images is not Adequately Addressed by the Extant Australian legal framework*

Chapters Three and Four illustrated that the risk of harm outlined in the thesis is not adequately addressed by extant laws.

Detailed examination of the Australian legal framework in Chapter Three demonstrated that the availability of a private law cause of action in relation to the unwanted publication of an image or its subsequent use is limited. An action will lie where the image reveals something that can be judged, objectively, to be private or confidential, or communicates something that is objectively detrimental to a person's reputation or standing. This limitation is significant given that Chapter Two found that a detrimental impact on an image subject can occur regardless of whether an image can be described, objectively, as harmful. In so far as intent is often an element of the causes of action discussed in Chapter Three, it is also relevant to recall that Chapter Two found that the publication or use of an image of a child can also have a detrimental effect on that child's development even where the publication or use was not ill-intentioned. A cause of action will also lie where it is established that the image was captured in breach of a legal or equitable right, or a contractual obligation owed to the image subject. However, in a wide range of situations, including those illustrated in the hypothetical case studies included in Chapter Four, the image was not captured in breach of a right of or obligation owed to the image subject. Chapter Three also noted that none of the causes of action discussed were designed to protect a person's autonomy, in terms of providing them with a choice as to whether or not or when, how and to whom a particular image of themselves should be published, or whether an image, once posted online, will remain online. This is also significant if choice and control are considered to be aspects of privacy.

Chapter Three outlined the rapid removal scheme introduced by the *Online Safety Act*. It was noted that the scheme only applies to material that meets the definition of 'cyberbullying material targeted at an Australia child' — that is, material that is seriously intimidating, threatening, harassing or humiliating. The scheme does not apply to material that is 'merely offensive or insulting'.<sup>10</sup> This is significant given that, as demonstrated in

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<sup>10</sup> Office of the Children's e-Safety Commissioner, *How Does the Commissioner Decide if Something Is Serious Cyberbullying Material?* Cyberbullying Complaints FAQs, < <https://www.esafety.gov.au/complaints-and-reporting/cyberbullying-complaints/cyberbullying-complaints-faqs>>.

Chapter Two, developmental harm is possible even with the publication or sharing of an image of a child or young person that cannot be described, objectively, as harmful.

A number of limitations of the regimes established under the *Privacy Act* and the *BSA* were also noted in Chapter Three. Not the least of these limitations is that they do not create private causes of action for individuals. Neither do individuals have standing to pursue breaches of the *Privacy Act* or the making available of content that should be prohibited directly against the entity responsible for the same. Instead, individuals must rely upon addressing a complaint to the body overseeing the relevant regime. Additionally, neither the regime under the *Privacy Act* nor that created by the Broadcasting Services legislation impacts directly upon the conduct of private individuals.

Finally, as noted in Chapter Three, although criminal offences do play some role in deterring or punishing the unauthorised publication of images, they are of limited utility in giving individuals the ability to control how or whether their images are published. This is because individuals have limited ability to participate directly within the criminal process.

The scenarios presented and discussed in Chapter Four further illustrated the limitations of Australian law in giving a child or young person control over their image, in the sense of having a private law action or other avenue of redress open to them. It was found that this was the case even where an image has been captured or used without the image subject's consent, and where the publication of the image online or its use in a particular context is unwanted and even harmful. The case studies also illustrate the fact that despite qualitative differences between the scenarios presented, for the image subject the outcome is generally the same. With the exception of Case Study One (Jackie), an image that has been manipulated to purportedly depict something that did not occur is treated (all things being equal) in the same way as an image that does depict reality. Again, all things being equal, an image used in a commercial context is treated in the way as an image used on a social media page or a gay voyeuristic website.

The lack of control — in the broad sense of the lack of legal redress or a legal avenue — can therefore be seen as a factor that contributes to the vulnerability of children to the risk of harm from unwanted publication of images. In this sense, the lack of control can be seen as part of the problem. Of course it is not the only factor, but only one of many; however, it is an important factor. Law can be used as a way of directly addressing the risks to development posed by unwanted publication. Legislation could, for example, give children greater 'autonomy' and reduce the risk that unwanted publication has on self-esteem and relationships by making it unlawful to capture or to publish images of children, either in general or in respect of certain types of images, at least without express consent. Legislation could provide a mechanism allowing for the removal of unwanted images. Law can also play a role in indirectly addressing the risks of development, for example, laws can deter others from taking or publishing images of children, or certain



types of images, and can influence the creation of new social norms around the capturing and publishing of images. Thus, while the lack of legal ‘control’, in the broad sense used above, can be seen as *part* of the problem, law reforms that provide greater ‘control’ should be seen as *part* of the solution.

#### 4 *A Regulatory Response to this Problem is Required*

Chapter Five found that a regulatory response to the problem of unwanted online publication of an image of a child or its subsequent use is needed.

Having determined in Chapters Three and Four that the problem of the unwanted online publication or use of images of children was not adequately addressed by the current Australian legal framework, Chapter Five considered whether the problem was sufficiently addressed by other means. In particular, the chapter considered Lessig’s other non-legal regulators of the internet — social norms, the market and the architecture of the internet (or code).

In terms of the market it was found that the advertiser-funded business model of a number of platforms suggests that the market is more likely to encourage users to share personal information, including images, about themselves and others (albeit within limits) rather than refrain from doing so. Chapter Five noted that there is little incentive for the market to provide a means of redress, prevention or mitigation in respect to the risk of harm to children in the absence of either laws or social norms that constrain the sharing and unauthorised online posting of images.

In terms of social norms, Chapter Five considered that it can be difficult to identify any ‘fixed’ or ‘entrenched’ social norms around the online disclosure of information, including images, about others. This is due to the relative novelty of the technology and information flows under consideration. However, it was observed that social norms are in a period of transition and may gradually be changing to reflect the realities of the digital world and the prevalence of internet use. Chapter Five noted that much has been written about the younger generation appearing to be more open and less concerned with privacy;<sup>11</sup> therefore, it was argued, if the posting of images of others is seen as being in line with developing informational norms, those norms will not operate to prevent the potential developmental harms outlined in Chapter Two. Chapter Five noted that there is also some evidence that informational norms developing around the taking and online posting of images of others might be related to a *mistaken* assumption that those who do not consent to their image being online can obtain adequate redress via the reporting mechanisms of social networking sites (in other words that ‘the market’ itself offers an effective solution). The chapter argued that where social norms are developing rather

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<sup>11</sup> See Chapter Five, Part Three, Section A.

than entrenched, as seems to be the case in the online context, law is an important factor in influencing what norms develop.

Chapter Five considered whether the development of code, or the architecture of the internet, could offer a solution to or mitigation of the problem with which this thesis is concerned. The chapter noted that while it is technically possible for code to offer a solution to or a means of mitigating the problem, it was unlikely to do so. This is because the architecture of internet platforms is often initiated and shaped by the commercial interests behind them.<sup>12</sup> Thus, for the same reason that the market is an imperfect regulator vis-a-vis the problem identified, code is also imperfect. Nevertheless, it was also noted that any legal reforms that are initiated to prevent, mitigate or provide redress for the developmental harms outlined in Chapter Two would almost certainly need to be supported by code in order to have practical effect.

#### *5 The Right to Development in the CRC Provides a Justificatory Basis for the Regulatory Response to the Problem*

Chapter Five found that the right to development in the *CRC* provides a justificatory basis for a regulatory response to the problem of the unwanted online publication of images of children or their subsequent use.

Chapter Five discussed the fact that, although the right to privacy in the *CRC* can provide a justificatory basis for laws that sought to give children more control over the online publication of their image, there are inherent difficulties in giving content to that right. It was suggested, therefore, that the right of development could provide an alternative justificatory basis for law reforms in this space. The right to development is one of four principles that should guide interpretation of all of the other rights in the *CRC*, which include, among others, the rights to privacy and to freedom of expression.

#### *6 A statutory take-down scheme for images offers the best solution to the problem, albeit only a partial solution*

A take-down scheme that provides for the removal of online images of children and young people would offer a partial solution to the problem with which this thesis is concerned. The exact form and reach of the scheme would need to be determined, but arguably a scheme that considers the reasonable interests of a child would be appropriate.

However, in recognition of the fact that a take-down scheme is not a perfect response to the problem, the scheme should form part of a multi-pronged approach.

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<sup>12</sup> Although code may also be shaped and instituted due to legal constraints upon those organisations. Of course, depending on the platform, individuals and groups quite separate from the platform host may have a degree of control over the information posted, for example, individuals who have their own blog or social networking profile make decisions about what to display and what to remove.

A take-down scheme could permit the take-down of an image by reference purely to the subjective wishes of an image subject or it could allow for the removal of images where their continued publication online was contrary to the reasonable interests of the image subject. Chapter Six noted that there would be difficulties in determining what those 'reasonable interests' should be in any given case, and that this could give rise to uncertainty. However, a reasonable interests test could provide a measure of control over images for children, without going so far as to create an image right. This was the only option from among those evaluated that addressed the problem with which this thesis is concerned directly rather than incidentally. As such, the option could be tailored to address the problem in a way that was able to achieve the best balance between the interests, rights and freedoms of an image subject who is a child and the interests, rights and freedoms of others affected by the removal or threat or removal of an image.

Nevertheless, a statutory take-down scheme can only offer a partial solution. This is not least because of inherent problems around enforcement of Australian law in the context of the 'borderless internet'.<sup>13</sup> There would also be significant complexities in a scheme that applied to both online images and those used in an offline context.

In other words, there is no 'silver bullet' that can deal with the problem with which this thesis is concerned. In fact, although a take-down scheme in relation to images offers the most direct solution to the problem, a multi-pronged response involving both regulatory and non-regulatory options is likely to offer the only realistic opportunity to address the problem.

#### *7 There is a Paucity of Research on the Views of Children and Young People Regarding Attitudes to Privacy in General, and to the Publication of Images or Their Use in Particular.*

Chapter Six noted the paucity of research on the views of children and young people regarding online publication of images or their use.

The views of children and young people on privacy in general have been sought in a number of different ways. In its inquiry into Australian Privacy Law and Practice, the ALRC undertook a process of consultation with children. Workshops organised by the ALRC for children and young people gave participants the opportunity to express their views on a number of issues related to the inquiry.<sup>14</sup> The ALRC also developed a website that sought to engage young people and encourage them to send comments to the ALRC inquiry.<sup>15</sup> Prior to the ALRC's inquiry, a survey on the attitudes of young people to privacy had been

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<sup>13</sup> Dan Jerker B Svantesson wrote in 2006 that 'Since its "birth" approximately 15 years ago, the World Wide Web ('www') has been viewed as borderless ...': Dan Jerker B Svantesson, 'The Not So 'Borderless' Internet: Does it Still Give Rise to Private International Law Issues?' July 2006, *Bond University e-Publications* <[http://epublications.bond.edu.au/law\\_pubs/96/](http://epublications.bond.edu.au/law_pubs/96/)>.

<sup>14</sup> ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 3, 2231 [67.29].

<sup>15</sup> *Ibid* [67.27].

conducted in South Australia. The majority of the participants in that study were actually young adults, but just under 10% were between the ages of 15 and 17 and 0.6% (2 respondents) were under 15. Researchers in various fields, such as computer mediated communication, child psychology and child wellbeing, have considered the views of children and young people to privacy in general. Despite this, research seeking the views of children and young people on their attitudes to privacy is limited, and one of the recommendations to come out of the ALRC's report was that a longitudinal study of the attitudes to privacy of Australians, particularly young Australians — and, specifically, to include those under the age of 18<sup>16</sup> — should be funded by the Australian Government.<sup>17</sup>

Something of the views of children and young people on the publication and use of images can be gleaned through submissions by organisations representing children to various inquiries.<sup>18</sup> In addition, some views on this have been expressed in the course of the consultations undertaken by the ALRC, and referred to above. In making submissions to the SCAG Inquiry, *Unauthorised Use of Photographs on the Internet and Other Ancillary Privacy Issues*, the NSW Commission for Children and Young People specifically sought the views of children and young people.<sup>19</sup> More recently children did express views on the use of images of themselves or others in the course of the High School Forum held to inform the JSCCS' report on cyber-safety.<sup>20</sup> As discussed in Chapter Two, researchers looking at bullying and cyberbullying have consulted children with regards to the impact on them of the use of images as a form of cyberbullying. Otherwise, the researcher is aware of very little research in this area. Indeed, the Committee on the Rights of the Child, in its report on the 2014 Day of General Discussion on Digital Media and Children's Rights, noted that the participants had 'stressed the lack of data on children and digital media as a key concern' and had agreed that 'further research and data collection, including comparative research, was necessary in order to better understand how children engage with ICTs and what their needs and concerns are.'<sup>21</sup>

Having discussed each of the key findings made in this thesis, the following part of the chapter offers a number of recommendations arising from this research.

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<sup>16</sup> Ibid [67.96].

<sup>17</sup> Ibid 2249 [Recommendation 67-1].

<sup>18</sup> For example, Youth Affairs Council of Victoria Inc, Submission No PR 172 to ALRC, *For Your Information: Australian Privacy Law and Practice*, 5 February 2007; New South Wales ('NSW') Commission for Children and Young People, Submission to SCAG Discussion Paper, *Unauthorised Photographs of the Internet and Ancillary Privacy Issues*, October 2005, 3 [5.2].

<sup>19</sup> NSW Commission for Children and Young People, above n 18, 1 [2.2].

<sup>20</sup> See further, Chapter 1.

<sup>21</sup> Committee on the Rights of the Child, Report of the 2014 Day of General Discussion: 'Digital Media and Children's Rights', 2014, 11 [50].

## IV RECOMMENDATIONS

This part of the chapter sets out the recommendations coming out of this research. The recommendations are as follows:

- 1. Australian law should be reformed to give children greater control over the online publication or use of their image, where that publication is unwanted, and a Commonwealth statutory take-down scheme for images should be considered for this purpose.**

This recommendation arises from findings two to six above. The take-down scheme recommended in this research is a statutory scheme that would be enacted in Commonwealth legislation. The scheme would be administered by a regulator rather than the courts, although would be backed up by court enforceable sanctions. Although such a scheme could take various forms, the form recommended here is one that allows for the issuance of a take-down notice whenever publication or use of an image of a child is against the 'reasonable interests' of that child. As to what those interests are in a given case, a non-exhaustive list of criteria could be specified as criteria that should be taken into account.

- 2. Consultation should be undertaken on the form and scope of the take-down scheme.**

Although this thesis has recommended a regulator administered take-down scheme based around the 'reasonable interests' of a particular child, public consultation involving all stakeholders, particularly children, should be undertaken on the exact form and scope of the scheme. In particular, as noted above and discussed in more detail in Chapter Six, there are important questions as to whether a take-down scheme should be limited to online content or should apply more generally, and as to whether there should be exemptions related to the type of forum on which content is hosted. Further consideration should also be given to whether the scheme would apply to content posted on social media sites, or more widely, and whether it should be a participatory scheme along the lines of that established by the *Online Safety Act*. The further research recommended in recommendation four below would partly inform the answer to some of these questions.

- 3. Further research is required on the impact of the unwanted publication and use of images on child development.**

This recommendation arises from the first two findings outlined above, namely that there are gaps in the research on the impact of bullying in the form of the unwanted publication and use of images and that even 'benign' images and those posted without ill-intent can be harmful. However, it is recommended here that research should consider the impact of unwanted publication and use of images not only on those domains of child development considered in this thesis (specifically self-esteem and relationships), but

upon other domains of development. The research should consider the impact of online publication and use, as well as 'offline' publication and use, and whether there is a difference.

**4. More research is needed on the views of children and young people regarding their attitudes to the privacy in general, and to the online publication of images or their use in particular.**

This recommendation arises from the seventh finding discussed above. As explained in Chapter Five, children have a right to express their views and have them accorded due weight. However, and as also noted above, there is a paucity of research on the views of children and young people regarding their attitudes to privacy in general, and their attitudes to the publication or use of images in particular. Further research in this area will also help to inform the development of the take-down scheme recommended above. Although 'point in time' research is valuable and necessary, a longitudinal study will also serve to illustrate any changes in these attitudes over a period of time. The need for a longitudinal study on privacy attitudes, particularly those of young people, was highlighted by the ALRC.<sup>22</sup>

**5. A multi-pronged and multi-stakeholder approach to the problem identified in this thesis is required.**

For reasons explained in Chapter Six, there is no perfect solution to the problem outlined in this thesis. Although a Commonwealth statutory take-down scheme, in the form recommended, would go some way to addressing the problem, other law reforms are also important. In particular, Australia should enact a statutory right of action for serious invasions of privacy. A cause of action for invasion of privacy has been recommended by the ALRC to fill gaps in Australian law and to more fully implement into Australian domestic law the right to privacy enshrined in Article 17 of the *International Covenant on Civil and Political Rights*.<sup>23</sup> A number of other law reforms were canvassed in Chapter Six and further consideration should be given to enacting these. In particular, the right to delete information, including images, or restrict its processing in certain circumstances should be considered for inclusion in the *Privacy Act*: this is one way to mitigate some of the longer-term harm relating to the persistence of data.

A multi-pronged approach to the problem also requires non-legal responses. As noted by Katz et al, albeit in the context of dealing with cyberbullying, legal and social responses need to be integrated.<sup>24</sup> Those authors also note findings that a legislative approach, without support for education campaigns and resources in school, was in fact

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<sup>22</sup> See Finding 7 above.

<sup>23</sup> ICCPR art 17.

<sup>24</sup> Ilan Katz et al, *Research on Youth Exposure to, and Management of, Cyberbullying Incidents in Australia*, Synthesis Report: Prepared for Australian Government Department of Communications, June 2014, Synthesis Report, 8 [2.3].

counterproductive.<sup>25</sup> Likewise, in dealing with the issues presented by the unwanted online publication or use of images of children, a purely legal response is not sufficient and may produce unintended consequences.

The development of social-norms and social protocols are fundamental to bringing about change in the control that individuals have and feel that they have in relation to their image in the online environment. To this end, more could be done in schools to teach children about the etiquette of uploading images of others to the internet. Education campaigns targeted at adults are also important — even parents sometimes upload images of their children without awareness of the potential long-term consequences of doing so. This is particularly important given that social norms around the capture, publication and use of images are developing rather than entrenched, as seems to be the case particularly in the online context. However, as explained in Chapter Five, there is an interrelationship between norms and law, so that without a legal response norms may be unlikely to change.

Chapter Six also noted that a code solution to the problem presented in this research may be possible. One example of a code solution was Mayer-Schönberger's built in expiry dates for certain data. A similar solution — but one that is, unlike Mayer-Schönberger's, driven by the interests of the market rather than concern for the subjects of information or images — is represented by the social platform, Snapchat. Snapchat allows users to send messages and images to each other that automatically 'self-destruct' after 10 seconds.<sup>26</sup> This mitigates one of the harms associated with the unwanted online publication of images — the persistence of data. However, the solution is far from perfect, as recipients of images are able to save a particular image permanently to their device — and forward it to others or post on a different platform, such as by using a third party 'application'.<sup>27</sup> Nevertheless, it is possible that young people themselves may drive even greater demand for platforms that provide 'self-destruct' services due, in part, to their wish for greater control over their image.

In short, while a legal response is required and has been proposed in this research, a legal response should always be part of a multi-pronged approach to the problem and involve a diverse range of stakeholders, including, among others, governments, industry, young people, schools, parents, and NGOs.

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<sup>25</sup> Ibid.

<sup>26</sup> 'Explainer: What is Snapchat?' Webwise <<http://www.webwise.ie/parents/explainer-what-is-snapchat-2/>>.

<sup>27</sup> See, eg, Daniel Bean, 'How to Save Snapchat Pictures without the Sender Knowing (Shhhh)' 27 March 2014, *Yahoo Tech* <<https://www.yahoo.com/tech/how-to-save-snapchat-pictures-without-the-sender-80875346215.html>>.

## V CONCLUDING STATEMENT

As noted throughout, the unauthorised use of an image is an issue of public concern,<sup>28</sup> one which has attracted government attention<sup>29</sup> and one in respect of which there are acknowledged gaps in Australian law.<sup>30</sup> This research therefore contributes to the debate on this issue, which is likely to become even more important as time goes by. This research has also moved the discussion about unwanted use of image beyond its traditional realm of personality rights and the discourse on privacy. Importantly, this thesis has identified gaps in research on cyberbullying, as well as in relation to the developmental implications of unwanted publication and use of images of children. These areas have been identified here as ripe for further research.

This thesis has argued that young people should have some control over how they are represented — by way of their visual image — on the internet, and certainly more control than they currently have. The research has shown that the unwanted online publication of images or unwanted use of online images of children poses a risk to their development. While recognising that the ‘wholesale elimination of risk is neither feasible nor desirable’<sup>31</sup> this thesis has submitted that, in order to fulfil its commitments to children’s rights under the *CRC*, Australia should do more by way of a regulatory response to address this risk. In order to provide children with greater control over the online publication of their image, this research has recommended the introduction of a statutory take-down scheme for images. It has also canvassed other law reform options that should be considered in addition to the introduction of the take-down scheme. However, the need to situate a legislative response within a broader package of social and educational initiatives has also been recognised.

Ultimately the problem of unwanted online publication of images and their subsequent use is complex and one to which there is no perfect solution. Nevertheless, to place the problem in the ‘too hard basket’ and to neglect the development of any legal response to it is to shirk from the task of translating children’s rights from theory to reality.

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<sup>28</sup> ALRC, *For Your Information*, above n 14, 2326–7 [69.106]–[69.109], and see 2224–5 [67.11] and [67.12]. See also ‘Calls made to raise Facebook age limit’, *Lawyers Weekly* (online), 21 July 2011 <[http://lawyersweekly.com.au/blogs/top\\_stories/archive/2011/07/21](http://lawyersweekly.com.au/blogs/top_stories/archive/2011/07/21)>, noting the concern expressed by some parents that images being uploaded by their children to Facebook may be prejudicial to their future career prospects.

<sup>29</sup> See generally ALRC, *For Your Information*, above n 14; SCAG, above n 5;; NSWLRC, *Invasion of Privacy*, Report No 120 (2009); Victorian Law Reform Commission, *Privacy Law: Options for Reform*, Information Paper (2001); Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 18 (2010). In relation to New Zealand see Law Commission (New Zealand), ‘*Privacy: Concepts and Issues, Review of the Law of Privacy Stage 1*’, Study Paper 19 (2008). In relation to the United Kingdom, see ‘MoD Facebook Generation Warning’, *BBC News* (online), 25 June 2008.

<sup>30</sup> ALRC, *For Your Information*, above n 14, vol 1, 453 [11.1].

<sup>31</sup> Sonia Livingstone and Brian O’Neill, ‘Children’s Rights Online: Challenges, Dilemmas and Emerging Directions’ in Simone van der Hof, Bibi van den Berg and Bart Schermer (eds) *Minding Minors Wandering the Web: Regulating Online Child Safety* (Springer, 2014 (24)) 19, 25.





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